

**A REVIEW
OF THE
LAND NEGOTIATION
PROGRAM:**

**A Review conducted for
The Department of Planning,
Industry and the Environment**

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1.

BACKGROUND

1.1 Overview

1. This Review was announced on 19 November 2019 with a completion date of 2 March 2020. The Terms of Reference (**ToR**) stated that the Purpose of the Review was “to undertake a review of the Land Negotiation Program (LNP)”. The ToR covered the objectives of the LNP, the scope of the Review and the timeframe. The scope included consultations with relevant persons and organisations.
2. The ToR are Annexure A to this Report.

1.2 Consultations

3. I have undertaken extensive consultations across NSW with relevant stakeholders and other interested persons and organisations. My main focus was on LNP participants.
4. I interviewed a total of 19 Council officers from seven different Local Councils: Blayney, Cabonne¹, Central Coast, Northern Beaches, Orange, Randwick and Tamworth.
5. I interviewed a total of 23 staff and elected representatives at the New South Wales Aboriginal Land Council (**NSWALC**) and seven different Local Aboriginal Land Councils (**LALC**): Darkinjung, La Perouse, Metropolitan, Nungaroo², Orange, Tamworth and Young.
6. I interviewed four facilitators involved with the negotiations.
7. I interviewed eighteen current and former NSW Government bureaucrats directly involved with the program or previously involved or with a general policy interest in the program. I interviewed various officers from the Office of Local Government, Aboriginal Affairs and the National Parks and Wildlife Service with minimal or peripheral involvement in the LNP but with involvement in wider related issues.
8. I interviewed six private lawyers involved in land dealing in various, relevant contexts.

¹ By teleconference.

² By teleconference.

1.3 Submissions

9. Calls for submissions were on the Department's website with the Terms of Reference and the media release. There were five submissions received through the website.
10. I received ten submissions personally, including two from LALCs not involved in the pilot program.

1.4 This Report

11. All interviewees were extremely co-operative and helpful and I could not have conducted this exercise without their thoughtful and careful contribution.
12. Obviously, all views, opinions, conclusions and recommendations expressed in this Report are my own. The report has been prepared solely for the use of Crown Lands, Land and Housing Division, Department of Planning, Industry and Environment (**Crown Lands, the Department**). Ownership of the Report and its annexures and transcripts lies with the Department. No responsibility to any third party is accepted as the Report has not been prepared, and is not intended, for any other purpose.
13. For privacy reasons, all interviewees and most submission writers are referred to generically by their role or organisation.

2.

LAND NEGOTIATION PROGRAM

2.1 Overview

14. Many of the processes and related issues are discussed in Chapter 5.

2.2 Land Negotiation Program

15. The LNP was established as a voluntary program with initially Local Councils and then LALCs invited to participate. It commenced in September 2016 with various phases started at different times.
16. An initial pilot program was designed to take in a range of different geographical and population factors. Some portions of Sydney and the nearby populated coastal areas and then some regional and rural areas were identified to give a variety of different experiences to be tested for efficacy before the program was rolled out across NSW.
17. Several Local Councils involved in an earlier version of the pilot program declined to participate for their local reasons. One Council ended its participation in November 2019 after several years and multiple negotiation meetings. None of these Councils contributed to the consultations, the latter because they failed to respond to various invitations to meet and discuss their experiences.
18. The original LNP was designed to “enable the divestment Crown land of local significance (Local land) to Councils and commence the strategic settlement of land claims with LALCs”. This was based on certain factors including with reference to Aboriginal Land Claims that “there are over 28,500 unsettled claims over Crown land”. By 31 October 2019, this had increased to over 36,738.
19. Further, it was contended in Departmental internal documentation that:

The current rate of processing [claims] continues to impede the fulfilment of ALR Act’s objectives. The uncertainty when dealing in Crown land leaves the State exposed to unfunded liabilities and opportunity costs, as land that has been claimed cannot be divested, activated or utilised until a claim is determined.
20. The LNP was intended to reduce the number of unresolved *ALR Act* claims. However, the LNP process could include the transfer of unclaimable land to LALCs as well as claimable land. It could be unclaimable land as the section 36 criteria were not met.

21. The Department's leaflet, *Crown land in New South Wales*³, described the LNP as a program that utilised the ALA under the *ALR Act* "to recognise the importance of land to Aboriginal people" and stated:

Our partnership with the NSW Aboriginal Land Council includes the development of the Aboriginal Land Agreement Negotiation Framework (2016) to ensure ALA negotiations are fair and likely to succeed in the shared objectives of:

- speeding the processing of Aboriginal Land Claims (ALCs)
- providing more sustainable social, cultural and economic outcomes for LALCs and Aboriginal communities from the return of land
- providing greater certainty to all parties over Crown land.

Note: ALAs do not replace the existing ALRC process. ALCs continue to be processed on an individual basis against criteria specified under Section 36 of the *ALR Act*. ALAs are a new mechanism based on negotiations that have the potential to allow for the settlement of multiple ALCs.

2.3 Pilot Program participants

22. Initially, Expressions of Interest were called for from Local Councils. Seventeen were received.
23. Several Councils were selected and then a process with four tranches or "cohorts" were designed to be implemented over several years with a new cohort coming into the LNP each year.
24. Some Councils then decided not to participate and there was a realignment process with the final pilot participants then selected.
25. The participants in the pilot program once it commenced were:
- a. Northern Beaches Council and the Metropolitan LALC,
 - b. Randwick City Council and the La Perouse LALC,
 - c. Central Coast Council and the Darkinjung LALC,
 - d. Orange City Council, Blayney Shire Council and Cabonne Council and the Orange LALC,
 - e. Tamworth Regional Council and the Tamworth and Nungaroo LALCs, and
 - f. Hilltops Council and the Young LALC.

³ Published late 2017.

2.4 Other reviews

26. There have been three previous reviews of the LNP and while perused, the views expressed in those reports are not reflected in this Report unless they are also consistent with my view.
27. The Department commissioned a report that was produced in September 2019 and entitled *Local Aboriginal Land Councils' Evaluation of the Land Negotiation Program* by Norman H, Freedman N, Ingrey C, Steel A, Moran N, Scott G, Snape F, West M, Parker M, and Apolonio T.
28. The Department conducted a *Strategic Review of the Land Negotiation Program* in September 2019 which is in draft form and remains confidential and privileged, although the basis of the latter claim is unclear.
29. In September 2018, the Crown Lands Directorate conducted an internal review of the LNP which made various findings and identified some deficiencies in the then conduct of the Program.

3.

ALR ACT CLAIMS

3.1 Overview

30. The provisions of the *Aboriginal Land Rights Act 1983* are a main source of power and related considerations in the operation of the LNP.
31. Set out below is a summary of some of the relevant issues.

3.2 History of ALR Act

32. The *Aboriginal Land Rights Act 1983* (NSW) (**the ALR Act**) was enacted by the New South Wales Parliament in 1983.
33. In his Second Reading Speech to the *Aboriginal Land Rights Bill 1983*, then Minister for Aboriginal Affairs, Frank Walker, stated that in developing the proposed legislation, the NSW Government had:

made a clear, unequivocal decision that land rights for [Aboriginal people] is the most fundamental initiative to be taken for the regeneration of Aboriginal culture and dignity, and at the same time laying the basis for a self-reliant and more secure economic future for our continent's Aboriginal custodians.⁴

34. Mr Walker referred to the "Keane Report", which was prepared by a Parliamentary Select Committee. He referred to that Report as placing "vital importance upon the need to return significant parts of this State back to their Aboriginal inhabitants as a form of compensation"; recognising the "severe economic deprivations" experienced by Aboriginal people in this State and concluding that in addition to having cultural and spiritual significance, land rights could "lay the basis for improving Aboriginal self-sufficiency and economic wellbeing".
35. Mr Walker also said that land rights involve a number of critical principles and that land rights meant "the recognition of prior ownership of this State of New South Wales" by Aboriginal people. In so recognising prior ownership, he said, the NSW Government "thereby recognise[d] (sic) Aboriginal rights to obtain land" and believed that "the essential task is to ensure an equitable and viable amount of land is returned" to Aboriginal people.
36. Significantly, Mr Walker said that: "Ever since I became Minister for Aboriginal Affairs I have been under pressure from the Aboriginal community to get on with the job of retuning land to [the Aboriginal people] as quickly as possible"

⁴ *Hansard*, LA, 24 March 1983, page 5088.

and that “Deferment will unacceptably delay this take, deny deserving [Aboriginal peoples’] enjoyment of their land and cruelly prolong deprivation and disadvantage”.

37. The legislative policy underlying the ALR Act as described by Mr Walker is encapsulated in the Preamble to the Act, which provides:

An Act to repeal the Aborigines Act 1969 and to make provisions with respect to the land rights of Aboriginal persons, including provisions for or with respect to the constitution of Aboriginal Land Councils, the vesting of land in those Councils, the acquisition of land by or for those Councils and the allocations of funds to and by those Councils; to amend certain other Acts; and to make provisions for certain other purposes.

WHEREAS—

(1) Land in the State of New South Wales was traditionally owned and occupied by Aboriginal persons—

(2) Land is of spiritual, social, cultural and economic importance to Aboriginal persons—

(3) It is fitting to acknowledge the importance which land has for Aboriginal persons and the need of Aboriginal persons for land—

(4) It is accepted that as a result of past Government decisions the amount of land set aside for Aboriginal persons has been progressively reduced without compensation— ...

3.3 Land Claims

38. The *ALR Act* introduced a scheme for land claims over Crown land by Local Aboriginal Land Councils (**LALCs**) or the New South Wales Aboriginal Land Council (**NSWALC**) (**Land Claims**).
39. Section 36(2) of the *ALR Act* provides that the NSWALC may make a claim for land on its own behalf or on behalf of one or more LALCs. Section 36(3) provides that one or more LALCs may make a claim for land within its or their area or, with the approval of the Registrar of the *ALR Act* (**the Registrar**), outside its or their own area.
40. Section 36(4) of the *ALR Act* provides that land claims under sections 36(2) and (3) are to: be in writing; describe or specify the lands in respect of which the claim is made and be lodged with the Registrar, who will refer a copy to the Crown Lands Minister (**the Minister**).
41. Section 36(5)(a) of the *ALR Act* provides that if the Minister is satisfied that the whole or part of the lands claimed is “claimable Crown lands”, the Minister must grant the claim by transferring to the claimant Council the whole or that part of the lands claimed. That is, the only enquiry is whether the claimed land is claimable Crown land as at the date of claim.

42. Section 36(5)(b) of the *ALR Act* provides that if the whole or part of the lands claimed in “not claimable Crown lands”, the Minister must refuse the claim or refuse the claim to the extent that it applies to that part.
43. “Claimable Crown lands” is defined in section 36(1) to mean lands vested in Her Majesty that, at the time the claim is made for the lands:
- (a) Are able to be lawfully sold or leased, or are reserved or dedicated for any purpose, under the Crown Lands Consolidation Act 1913 or the Western Lands Act 1901;*
 - (b) Are not lawfully used or occupied;*
 - (b1) Do not comprise lands which in the opinion of the Minister are needed or likely to be needed as residential lands;*
 - (c) Are not needed, nor likely to be needed, for an essential public purpose; and*
 - (d) Do not comprise lands that are the subject of an application for a determination of native title registered in accordance with the Commonwealth Native Title Act; and*
 - (e) Do not comprise lands that are the subject of an approved determination of native title within the meaning of the Commonwealth Native Title Act.*
44. Section 36(5A) of the *ALR Act* provides that where the Minister is not satisfied within the meaning of section 36(5)(b) that the lands claimed is claimable Crown lands because the lands are needed or likely to be needed for an essential public purpose, the Minister may nevertheless grant the claim subject to the imposition of a condition if the need for the lands for the public purpose would be met if the claim were granted in whole or in part subject to the imposition of a condition (for example, by way of a covenant or easement), provided that the condition is agreed to be the Aboriginal land council making the claim.
45. Section 36(6) of the *ALR Act* provides that an Aboriginal Land Council may appeal to the Court against a refusal under section 36(5)(b) of a claim made by it.
46. Section 36(7) provides that the Court, being the Land and Environment Court of NSW, shall hear and determine any appeal made to it under section 36(6) in respect of any lands claimed. The provision further provides that if the Minister fails to satisfy the Court that the lands or a part thereof is not claimable Crown lands, the Court may order that the lands or the part thereof be transferred to the claimant Aboriginal land council (or if the claim was made by the NSWALC, to a LALC nominated by the NSWALC if any). That is, the Minister bears the onus of satisfying the Court that claimed land is not claimable Crown lands.
47. Section 36(9) provides that any transfer of lands to an Aboriginal Land Council under section 36 (that is, whether by the Minister or the Court) will be for an estate in fee simple. However, the transfer will be subject to any Native Title rights and interests existing in relation to the lands immediately before the transfer.

48. There is nothing in the *ALR Act* which prohibits repeat land claims over the same land. Conceptually, this must be correct as land may fall within the definition of claimable Crown lands at one point in time but may no longer fall within the definition at a later point in time, for example if the lands are no longer needed (or likely to be needed) for an essential public purpose.

3.4 Land Councils

49. At the time of its commencement, the *ALR Act* established 119 local Aboriginal Land Councils and the NSWALC as the relevant State-wide body.
50. Under section 54(2A) of the *ALR Act*, an adult Aboriginal person is qualified for membership of a LALC if they: (a) reside within the area of the LALC and is accepted on that basis as being qualified to be a member by a meeting of the Council; or (b) has a “sufficient association with the area” of the LALC, again to be determined by the voting members of the Council at a meeting of the Council; or (c) is an Aboriginal owner in relation to land within the area of the LALC.
51. Under section 52(g) of the *ALR Act*, one of the functions of a LALC in relation to the acquisition of land and related matters is “to make claims to Crown lands or to enter into Aboriginal Land Agreements”.
52. Under section 106(2)(f) of the *ALR Act*, the NSWALC has functions in relation to the acquisition of land and related matters which include “to make claims to Crown lands or enter into Aboriginal Land Agreements, either on its own behalf or, if requested by a Local Aboriginal Land Council, on behalf of that Council”.

3.5 Amendments to the *ALR Act*

53. The *ALR Act* has been amended on a number of occasions since its commencement in 1983.⁵
54. Of these, the *Aboriginal Land Rights Amendment Act 2009* and the *Aboriginal Land Rights Amendment Act 2014* introduced the most substantive changes.

3.5.1 The 2014 *ALR Act* Amendment

55. The *Aboriginal Land Rights Amendment Act 2014* (**the 2014 Amendment**) introduced a raft of amendments to the *ALR Act*, including a number of significant changes.
56. Most important was the introduction of section 36AA where provision for the Aboriginal Land Agreements was inserted into the *ALR Act*. This provision allows the NSW Government and LALCs to enter into agreements relating to land transfers and land use without going through the existing land claims determination process available under section 36 of the *ALR Act*. In the Second Reading Speech to the Bill, the [then] Minister for Aboriginal Affairs, Mr Victor

⁵ Amendments were made in 1986, 1990, 1991, 1995, 2001, 2006, 2009, 2013 and 2014.

Dominello, said that the determination process under section 36 is a lengthy and costly process. He referred to delays and the backlog and the more than 26,000 undetermined land claims at that time and said that these issues resulted in uncertainty for Government, industry and Aboriginal communities. He also said that litigation relating to land claim determinations resulted in substantial costs for both Government and LALCs and the adversarial approach promoted within the system could undermine relationship-building between Government and Aboriginal communities.

57. Further, section 36AA allows for the settlement of multiple land claims simultaneously, contrary to the case-by-case assessment process under section 36. Section 36AA also enables parties to agree on a range of alternative outcomes to the transfer of claimable Crown land in fee simple, such as financial and other forms of consideration; exchange or leases of land from Government to LALCs or from LALCs to Government; conditions or restrictions on the use of land; joint access and co-management opportunities on land; and undertakings by the parties with regard to the future lease, transfer, management or use of any land. Negotiations for an agreement under section 36AA may commence whether or not there are current Land Claims on foot, and any existing Claims do not have to be determined or withdrawn before negotiations can begin. The process is voluntary, and LALCs retain the right to claim Crown land under the existing provisions of the Act if they do not choose to engage in the agreement-making process or if they no longer wish to participate.
58. Secondly, the 2014 Amendment inserted additional sub-provisions to section 36 to allow the Registrar to refuse to refer new Land Claims to the Crown Lands Ministers for determination if a title search reveals that the land is privately owned and is therefore not Crown Land available to be claimed.
59. Thirdly, the 2014 Amendment inserted section 36B which prohibits, where an LALC has appealed to the Court against a refusal of a Land Claim, acts or omissions by the Crown Lands Ministers which would cause anything to occur in relation to that land that would cause any land claim in relation to that land before final determination of the appeal to be unsuccessful.
60. Fourthly, by the insertion of section 52A, the 2014 Amendment removed additional requirements providing that LALCs, which have obtained registration as an Aboriginal housing organisation under the *Aboriginal Housing Act* or as a community housing provider under the national regulatory code, are exempt from having to separately obtain approval from the NSWALC for their social housing schemes. This means that LALCs will not have to comply with two parallel schemes to obtain approval to run their social housing programs.
61. Fifthly, the 2014 Amendment removed the requirement for a LALC's community, land and business plan to be approved by the NSWALC, but retained the requirement to provide those budgets and plans to the NSWALC for noting.

62. Sixthly, the 2014 Amendment exempted LALCs from the proactive mandatory disclosure requirements under the *Government Information (Public Access) Act 2009*, although all other disclosure requirements under the *GIPA Act* remain the same and the NSWALC is still required to comply with all aspects of the Act.
63. Seventhly, the 2014 Amendment made clear that the functions of a LALC include establishing, acquiring, operating or managing business enterprises, subject to reporting requirements. The 2014 Amendment expressly authorised a LALC to establish, acquire, operate or manage an Aboriginal and Torres Strait Island corporation within the meaning of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).
64. Eighthly, the 2014 Amendment empowered the Registrar to seek an injunction preventing a person or a LALC from contravening the *ALR Act* and to apply for a search warrant to obtain information if he or she has reasonable grounds to believe that there is a contravention of the Act or the regulations, or documents sought by administrators or investigators appointed to LALCs have not been provided. The 2014 Amendment also increased the maximum penalties for offences in the *ALR Act* in line with penalties in similar legislative regimes. The 2014 Amendment required the Registrar to report annually to the Minister on the exercise of his or her powers under the Act. Mr Dominello in the Second Reading Speech said that these strengthened enforcement mechanisms were key to protecting the assets and accountability of LALCs.
65. Finally, the 2014 Amendment updated the disciplinary provisions of the *ALR Act* by providing clearer definitions of what constitutes "misconduct", streamlining the procedures for dealing with complaints, and empowering both the Registrar and the NSW Civil and Administrative Tribunal to impose harsher penalties once misconduct has been established.

3.5.2 The 2009 ALR Act Amendment

66. The *Aboriginal Land Rights Amendment Act 2009* (**the 2009 Amendment**) importantly inserted Division 4 – "Land Dealings by Aboriginal Land Councils" into Part 2 of the *ALR Act*. It provides procedural and substantive requirements for land dealings.
67. The 2009 Amendment inserted Division 4A – "Community Development Levy" into Part 2, which requires a LALC to pay a levy in particular, prescribed "dutiabale transactions" including relation to a transfer of land, an agreement for the sale or transfer of land and related provisions.
68. The 2009 Amendment inserted section 149A, which requires the NSWALC to establish an account named the "New South Wales Aboriginal Land Council Community Fund" into which is paid amounts of community development levy and other amounts, and from which is payable money for grants to a LALC for the purpose of the management and acquisition of land, money for community benefit schemes, etc.

3.6 Legal proceedings under the *ALR Act*

69. One mechanism for assessing the overall efficiency of the *ALR Act* and the processes and procedures underpinning it is the frequency and complexity of legal proceedings instituted by either party.
70. Legal proceedings under the *ALR Act* are predominantly commenced pursuant to section 36(6) of the *ALR Act*, which provides that a LALC may appeal to the Land and Environment Court where the Minister has refused a land claim in accordance with section 36(5)(b) – that is, where the Minister is satisfied that the whole or part of the lands is “not claimable Crown lands” within the meaning of section 36(1) of the *ALR Act*.
71. For this reason, many of the authorities in relation to the *ALR Act* are concerned with the construction and applicability of section 36(1).

3.6.1 Decisions of the High Court

72. There have been two matters under the *ALR Act* determined by the High Court.
73. In the most recent of the two matters, *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act*⁶, the NSWALC was the appellant and was unsuccessful. In this matter, the High Court considered the meaning of “lawfully used or occupied” in section 36(1) of the *ALR Act*. The Minister had refused the NSWALC land claim on the basis that the claimed land was lawfully used or occupied. Different parts of the claimed land had been dedicated for the purposes of “Gaol Site (extension)”, “Gaol Purposes” and “Gaol Site (addition)”. Although the prison was no longer operating and proclamations of the claimed land as the “Berrima Correctional Centre” and “Berrima Correctional Complex” had been revoked, the land and buildings were still occupied by Corrective Services NSW which guarded and maintained them, and used the site for working visits by community service order workers. A majority of the High Court held that the claimed land was occupied at the date of claim by reference to the activities taking place on it, and that it did not need to be actively used for its dedicated gaol purposes to be “lawfully occupied” as that would deny “occupied” a separate sphere of operation from “used” in section 36(1)(b).
74. In *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council*⁷, the Minister was the appellant and was unsuccessful. In this matter, steps taken to bring about the sale of claimed land were held not to amount to lawful use within the meaning of section 36(1). Critically, nothing was being done on the land when the land claim was made and nothing had been done for a considerable time prior to the land claim being made. Although there was evidence of visits by surveyors and the real estate agent to the land, this did not amount to a use of the land for the purposes of the *ALR Act* and everything else that was being done towards selling the land occurred elsewhere. The

⁶ [2016] HCA 50; (2016) 260 CLR 232.

⁷ [2008] HCA 48; (2008) 237 CLR 285.

majority of the High Court said that nothing in earlier decisions of the NSW Court of Appeal, and nothing said in this decision, should be understood as attempting an exhaustive definition of when land is not lawfully used or occupied or of what is the relevant use or occupation that will take lands outside the definition of “claimable Crown lands”. In all cases, the majority said, it is necessary to consider the “acts, facts, matters and circumstances” which are said to show that land does not meet the description of “not lawfully used or occupied”⁸.

3.6.2 Decisions of the NSW Court of Appeal

75. Where a party is unsuccessful in the Land and Environment Court, there exists a right of appeal to the NSW Court of Appeal.
76. As at 1 February 2020, there were twenty-five appeals under the *ALR Act* determined by the NSW Court of Appeal, with twenty-one of these matters involving a refusal of a land claim.
77. Of the matters which involved a refusal of a land claim:
 - a. The Minister was the appellant from a decision of the Land and Environment Court in thirteen matters,
 - b. A LALC was the appellant from a decision of the Land and Environment Court in seven matters,
 - c. The Minister was “successful” in ten matters (noting that one of these favourable decisions was overturned on appeal in the High Court), and
 - d. A LALC was “successful” in eleven matters in the NSW Court of Appeal.
78. A schedule of these cases is set out in Annexure B. The Court of Appeal traversed a number of important key provisions of the *ALR Act* and these are discussed in Annexure B.

3.7 Implied obligations and the ALR Act

79. The administration of the *ALR Act* from a Government perspective involves a number of administrative law principles which must be observed to ensure the proper and orderly administration of the legislation.
80. Relevantly, in *Jerrinja Local Aboriginal Land Council v Minister Administering the Crown Lands Act*⁹, Jagot J considered obligations implied on the Minister by the *ALR Act*.

⁸ At [70].

⁹ [2007] NSWLEC 577; (2007) 156 LGERA 65 (*Jerrinja*),

3.7.1 Good faith

81. In *Jerringa*, the question arose as to the scope for jurisdictional error when the Minister is issuing a certificate under section 36(8). The Minister, in issuing a certificate under section 36(8)(b), had adopted a briefing note which stated that the purpose of the provision is to enable the Minister to ensure the land needed or likely to be needed for an essential public purpose is not “lost” to the public because a claim had been made before the need or likely need arose. The LALC contended that section 36(8) had to be read in accordance with section 36(1), which provides that the “need” for the land had to be found at the time the land claim was made. The LALC argued that therefore the Minister’s decision-making process had proceeded on an erroneous basis.
82. Jagot J held that the privative provision in section 36(8) would not protect any jurisdictional error by the Minister and in this case, the certificates were void for jurisdictional error and could not be tendered in the appeal. She said that the Minister cannot accrue power to issue a certificate under section 36(8)(b) by forming a state of satisfaction that claimed land is needed or likely to be needed for an essential public purpose other than in accordance with the definition provided in section 36(1)(c) of the *ALR Act*¹⁰. She said that an attempt in good faith to exercise a statutory power dependent on a state of satisfaction is insufficient: if the decision-maker has misconstrued in a material respect the statutory power then he/she will not in fact or law have exercised that power.¹¹ In this matter, it was immaterial that the Minister has formed a state of satisfaction in good faith because the briefing notes materially misdirected the Minister with respect to the function in section 36(8) in a manner inconsistent with the meaning and operation of that provision.

3.7.2 Obligation to determine claims within a reasonable time

83. In *Jerringa*, the Minister accepted that section 36(5) of the *ALR Act* contained an implied obligation, enforceable by a claimant land council, requiring the Minister to determine claims within a reasonable time.¹² Jagot J said that this must be so given that a land council’s right of appeal depends upon a refusal by the Minister.¹³ She further said that while a reasonable time “may vary on a case-by-case basis, a delay of 15 to 20 years in determining claims does not accord with any idea of reasonableness”.
84. In this matter, there had been “extraordinary delay” of more than 20 years in the Minister’s determination of the claim and reasons for the delay said “not [to be] meaningfully exposed in the evidence”. Jagot J also explained the remedy for delay inconsistent with the implied obligation as follows:

[145] ... It is one thing to accept that the Minister must determine a claim within a reasonable time. If the Minister fails to do so then the remedy is

¹⁰ *Jerringa* at [116].

¹¹ *Jerringa* at [128].

¹² *Jerringa* at [125].

¹³ *Jerringa* at [125].

an order requiring the Minister to discharge the function under s 36(5). This assumes that breach of the implied reasonable time requirement in s 36(5) does not deprive the Minister of power to exercise that function. The duty to determine the land claim remains unfulfilled and the courts may compel performance of that duty. It is another to accept that breach of a time requirement deprives the Minister altogether of the function under s 36(8). If the same reasoning applied to s 36(5) then the appeal right could never accrue.

3.8 Concerns regarding the assessment of claims under the ALR Act

85. Since at least 2005, concerns regarding the significant delays and backlog in the assessment of claims under the *ALR Act* have been expressed in a number of reports and publications. In particular, the NSW Ombudsman and the NSW Auditor-General have addressed comment on the issue.

3.8.1 Annual Report of NSW Ombudsman

86. In its *Annual Report 2008-2009*¹⁴, the NSW Ombudsman examined the “significant backlog” of Aboriginal land claims in NSW. The Report stated:

The Department of Lands (DoL) is responsible for assessing and investigating land claims made under the Aboriginal Land Rights Act 1983. In mid-2008 we became aware that there were 9,000 outstanding claims. We met with department staff responsible for handling claims, the Aboriginal Land Rights Registrar, and representatives of the NSW Aboriginal Land Council to identify the reasons for the problem.

We learned that in 2005, there were only 1,100 outstanding claims. Since then the number of new claims has been greater than the total number of claims made in the previous 22 years. At the department’s current processing rate of 350 claims per year, it would take 25 years to deal with the backlog. There are already a group of undetermined claims that are between 18 to 20 years old. There are also 400 claims that need to be surveyed before titles to land can be transferred.

In 2007 the Auditor-General recommended the department reduce the time taken to process Aboriginal land claims as well as time taken to transfer legal title to successful Aboriginal land claimants. It appears little progress has been made in either of these areas.

3.8.2 Commentary by the Auditor-General between 2007 to 2019

87. Between 2007 and 2019, the Auditor-General has repeatedly recommended that the relevant Department responsible for processing land claims under the *ALR Act*:

¹⁴ NSW Ombudsman, *Annual Report 2008-2009* at page 86.

- a. significantly reduce the time taken to process Aboriginal land claims because the number of outstanding or unprocessed claims was unacceptably high and generally increased each year, and
- b. significantly reduce the time taken to transfer legal title to successful claimants because claimants cannot fully access or use the land until title has passed.

88. This commentary and recommendations are set out in detail in Annexure C.

3.9 Conclusion

89. One of the main criteria for the implementation of the LNP was to reduce the unresolved Land Claims that have been lodged over the last 36 years. The issues arising from the ongoing delays and lack of any transfers of title are discussed in Chapter 5.

4.

CROWN LANDS LEGISLATION

4.1 Overview

90. The second main legislative arm to the LNP is the *Crown Lands Management Act 2016*.
91. A brief overview of its recent legislative development is set out below.

4.2 *Crown Lands Act 1989*

92. The *Crown Lands Act 1989* (NSW) provided a procedure for the assessment of Crown land to identify appropriate uses before the making of any decision to sell or lease it to private interests. The provisions in the Act did not apply to land in the Western Division of NSW under section 2A and Schedule B of the *Western Lands Act 1901* (NSW).

4.3 *Crown Lands Management Review in 2014 - 2015*

93. In or about early 2014, NSW Trade & Investment (now NSW Department of Planning, Industry & Environment) commenced the Crown Lands Management Review, which examined ways to improve the management of existing Crown land assets. During this review process, in early 2014, the Crown Lands Management Review Report was made available online and comments from stakeholders were invited on proposed changes to the Crown Lands legislation through a White Paper released at the same time.
94. In October 2015, NSW Department of Industry produced a document entitled *Response to Crown Lands Legislation White Paper: Summary of Issues and Government Response* which summarised the “main themes” arising from submissions in response to the White Paper.
95. The Crown Lands Management Review and White Paper noted that the *ALR Act* was to be reviewed separately as it was outside the scope of the Crown land review. However, page 6 of the report noted that the proposed objects of the Crown Lands Act would provide for Aboriginal use and co-management of Crown Reserves. Page 21 of the document, under the heading “General Aboriginal issues”, stated that the White Paper’s proposal to transfer Crown land to local land councils would not include land the subject of undetermined land claims under the *ALR Act*.

4.4 *Report of NSW Legislative Council Inquiry into Crown Land in 2016*

96. In June 2016, the NSW Legislative Council established the “Inquiry into Crown Land” to inquire into and report on Crown land in NSW including, as per the Inquiry’s terms of reference, “the extent of Aboriginal Land Claims over Crown

Land and opportunities to increase Aboriginal involvement in the management of Crown land". As part of that Inquiry, the General Purpose Standing Commission No. 6 produced a *Report* dated 13 October 2016.

97. The *Report* considered the implementation of the Local Land Pilot (which the NSW Government was using to guide its reforms in relation to Crown land) and found at chapter 2.89 that, although many parcels of land were the subject of outstanding Aboriginal land claims, the level of consultation with local Aboriginal land councils in relation to the pilot project had been inadequate. Instead, the Government had first gone to a select group of local councils to work out what land they would like transferred to local government ownership.
98. The *Report* also included a section entitled "Backlog of Aboriginal land claims". The section at page 73 referred to a majority of inquiry participants speaking of the high volume of unprocessed Aboriginal land claims and the "slow, ineffective, and frustrating process for dealing with them".
99. At chapter 6.18, the NSW Government's submissions were said to acknowledge that the extremely drawn-out claims process spanning 33 years had created "uncertainty for government, industry and the Aboriginal communities that land rights are intended to benefit". This process, coupled with legal proceedings, was acknowledged as further undermining "relationship building between government and Aboriginal communities".
100. Inquiry participants referred to the small number of claims being processed or granted as hindering Aboriginal communities' ability to address issues through the establishment of economic bases or by using the land for cultural and economic purposes. Inquiry participants referred to the current land claims system as being neither respectful nor helpful to the Aboriginal community.
101. The Committee received evidence at pages 81-84 that the ability of Aboriginal communities to effectively use land they had been granted for economic and social benefit was hindered by the majority of land granted being zoned as "environmental land". In particular, inquiry participants on behalf of local Aboriginal councils noted their difficulty in claiming economically viable land. The Committee recommended at page 84 that the Minister for Lands and Water develop a policy to prioritise Aboriginal land claims for economically viable land.

4.5 Crown Lands Management Act 2016

102. The *Crown Lands Management Act 2016* was enacted by Parliament in 2016. The Act consolidated eight pieces of legislation into one Act, repealing the *Crown Lands Act 1989*, the *Crown Lands (Continued Tenures) Act 1989*, the *Western Lands Act 1901* and other legislation.
103. The majority of the provisions of the *Crown Lands Management Act 2016* (NSW) commenced in 2018. Any existing lease, licence or permit issued under previous legislation was to continue for its agreed term. From 1 July 2018, all new leases, licences and permits were to be issued under the new legislation.

104. The Act introduced a number of significant changes to the management of Crown land by local councils.
105. First, under the Act, the previous system of trust and trust managers was replaced with a single incorporated manager responsible for each Crown reserve, known as the “Crown land manager”. Crown land managers are now able to manage reserved Crown land as if it were community land under the *Local Government Act 1993* (NSW). However, the relevant Minister retains important oversights and powers, including the ability to make “Crown land management rules” which must be complied with and the requirement that local council Crown land managers will not be able to sell or re-categorise managed Crown land without the consent of the Minister.
106. Secondly, the Act enables the Minister to vest “transferrable Crown land” in a local council. Crown land thus vested is taken to be acquired by the local council as “community land” within the meaning of the *Local Government Act 1993* (NSW) and council obtains a freehold interest over the land, subject to native title interests and certain other exceptions. Transferrable Crown land is defined to mean Crown land that has not been dedicated or reserved or declared to be a wildlife refuge or which is not required to be used in a particular way under another statute. For land to be transferred, certain conditions must be met, including that: the local council must agree to the vesting; the land must be wholly within the area of the local council in which it is being vested; if the land is subject to a land claim under the *ALR Act*, written consent from the local Aboriginal land council or the NSW Aboriginal Land Council (whichever body has made the relevant land claim) is required; and the Minister must be satisfied that the land is suitable for “local use”.
107. Thirdly, Crown land managers are required to ensure that they adopt a “plan of management” for all Crown land they manage as community land within three years.
108. Fourthly, the Act requires Crown land managers to employ or engage a “native title manager” with approved training and qualifications to oversee and approve dealings and actions that may affect native title. The native title manager is to provide written advice before the council undertakes certain types of dealings over the Crown land which it manages, for example, granting leases, licenses, permits, easements or rights of way over the land.
109. Fifthly, under the Act, local councils are now responsible for making certain native title compensation payments relating to Crown land for which they are a Crown land manager or any former Crown land that is vested in it. This applies to compensation payable under specified sections of the *Native Title Act 1993* (Cth) while the NSW Government remains liable for all other compensation payments under the *Native Title Act 1993* (Cth).
110. The Act refers to Aboriginal interests in Crown land in its objects of the Act, which include to facilitate the use of Crown land by the Aboriginal people of NSW because of the spiritual, social, culture and economic importance of land to Aboriginal people and, where appropriate, to enable the co-management of

dedicated or reserved Crown land. In section 3.3 of the Act, a local Aboriginal land council is included in the list of “qualified persons” for appointment as a Crown land manager.

5.

ISSUES FOR DISCUSSION

5.1 Overview

111. The development and implementation of the LNP has given rise to a range of issues which require close reconsideration and review.
112. The negotiation process was time-consuming and complex. This compounded some of the problems that were unidentified but inherent within the structure of an innovative, broad ranging land transfer proposal. A clear identification of those problems and related issues and an approach to address them should permit the overall process to proceed in a timely manner with better management of the expectation of all parties with a focus on results – the transfer of land and other related benefits that could arise.
113. This Chapter focusses on the issues that emerged from the consultations and the document review and that contributed to the failure of the LNP to achieve any measurable results at all over three years, and on a way forward for the majority of those issues.
114. The focus of the discussion is the three parties to the LNP processes: the NSW Government through the Departmental Crown Lands team, the relevant Local Council and the relevant LALC, assisted on some occasions by NSWALC.

5.2 Title of program

115. The title of the program was initially the Land Divestment Program. This was reflected in the August 2016 Departmental document, *Aboriginal Land Agreement Negotiation Framework – Designed for the NSW Crown Land Divestment Program*. Clearly, the term “divestment” is important when the usual meaning is ascribed, that is to “divest” is “to take away, alienate (property etc.)”¹⁵ or “to take away (property, etc., vested in any one); to alienate, convey away”¹⁶.
116. The internal Departmental documents of April 2016 called the program in part the “land asset transfer implementation plan”. As initially designed, there was an active voice to the process, inferring that there would be transfers of title occurring.
117. The program was renamed in 2017 as the “Land Negotiation Program”. One Crown Lands manager in interview explained the change was “to better describe the nature of the program”.

¹⁵ *Macquarie Dictionary*, 5th ed, page 488.

¹⁶ *Oxford English Dictionary*, 2nd ed, Vol IV, page 889.

118. However, the rebranding of the Program was more than just changing a noun. It fundamentally altered the objective of the Program by removing the primary focus, through the name, on the Crown divesting itself of land to the Crown engaging in negotiations about land. That alteration is a reflection of the outcome of no land transfer under the LNP by November 2019 when the Program was suspended pending this Review.
119. An opportunity to actively engage with Councils and LALCs to resolve a range of outstanding land issues has been eschewed and the outcome has become one of defeating any claim in any possible way. The mechanisms currently being used to achieve this altered objective are addressed in detail below.

5.3 Objectives of LNP

120. The ToR for this Review of the LNP set out four Objectives. These were stated as:
1. Retention of certain Crown land for the benefit of all the people of NSW
 2. Transfer of appropriate land to Local Councils and LALCs
 3. Deliver improved economic, social and cultural opportunities for Aboriginal people
 4. Improved certainty in dealing with Crown land
121. There was some disquiet and concern about these objectives as LNP other parties' interviewees claimed that these were new and had not been seen previously, and certainly not approved by them, in either content or order.
122. Hence, the source of those particular objectives became an issue in itself.
123. These views were confirmed by an internal review by Crown Lands' staff conducted upon request during the time of this Review. In identifying 16 relevant internal and externally published documents, not one had the Objectives in the ToR in the same order and format. This suggests that these Objectives were created only for the ToR. Some previously published documents referred to some of the objectives of this Review in a broader narrative but most did not identify the Objectives as now set out. Hence, this Review was measuring the progress and outcome of the LNP against a set of Objectives which were never actually used by any participants as a guiding set of principles at all.
124. An internal Crown Lands document from April 2016 described the LNP in the following manner:
- New, voluntary negotiations will enable the divestment Crown land [sic] of local significant (Local land) to Councils and commence the strategic settlement of lands claims with LALCs. This will facilitate increased certainty, investment and economic opportunity. Councils, communities and Aboriginal people will benefit from local decision making and the economic, social and cultural benefits that come from land ownership.

Land of State significance will be retained in accordance with approved State land criteria.

125. The *Aboriginal Land Agreement Negotiation Framework, Designed for the NSW Crown Land Divestment Program*, published by the Department in August 2016, listed:

a set of the principles [which] has been developed to guide ALA negotiations. It is expected that the parties to an ALA negotiation will affirm these and any other relevant principles at the commencement of negotiations and rely on them to guide the conduct of negotiations.

126. The scope of the negotiations was set out to be within the terms of section 36AA(5) of the *ALR Act* which include “the exchange, transfer or lease of land”.
127. The ToR Objectives were criticised for a range of reasons. One important one was that in the ordering of the objectives, the “retention of certain Crown land for the benefit of all people in NSW” was listed first. The inclusion of “all people” was obviously an intentional wording choice to make clear that there was no priority for Aboriginal people. By asserting that as this Review’s first objective, it would appear that one of the two initial focuses of the LNP, addressing outstanding Land Claims, has dissipated and the 10 principles of the *Negotiating Framework* have been effectively abandoned.
128. There is no documentary trail readily available during the Review that underpins this shift but it is critical to the focus and intention of the LNP as at November 2019 when the ToR was publicly released. That shift is reflected in the views of some participants that the negotiations have moved significantly from the early days in 2016. The negotiations are now described colloquially by many interviewees as “the land is all ours and we are not giving you any that is or may ever be worth anything”. That attitude is said to be reflected in many exchanges and comments during the 2017-2019 negotiations.
129. As discussed elsewhere, the failure to acknowledge that Aboriginal communities have enforceable legal rights is regrettably reflected in this first objective. Even if it was contended that the first objective had no greater status than the other three, there is nowhere recognised any rights approach to the LNP structure or process.
130. While the third objective is listed as “deliver improved economic, social and cultural opportunities for Aboriginal people”, this has not been reflected in the actual negotiation processes.

5.4 Role of *CLM Act*

131. The LNP was initially established under the *CLM Act*. The objects of the *CLM Act* are potentially inconsistent with the Preamble to the *ALR Act*, with a conflict between “all people” in NSW compared with Aboriginal people in NSW, a separate but unacknowledged subset of “all people”.

132. The Departmental leaflet, *Crown land in New South Wales*¹⁷, stated that the LNP was in response to recommendations from the Crown Lands Management Review in 2014 and further stated:

We are working to ensure that land within the NSW Crown Estate is held by the most appropriate landholder so the people of NSW can gain positive social, economic, cultural and environment benefits. It is also important to retain land of State significance for future generations.

The program benefits include:

- local ownership of Crown land to advantage local communities
- reduced red tape and the regulatory burden on local government
- more efficient and streamlined land management
- recognition of the importance of land to Aboriginal people and to support sustainable spiritual, cultural, environmental and economic benefits for Aboriginal people.

133. The fundamental contradiction between the two statutes has not been addressed in any publicly available documents and appears not to have been addressed internally at all. The approach reflects the adoption of a primacy of “the ownership, use and management of the Crown land of New South Wales” as opposed to an equality between the two legislative schemes. There is no legal validity to giving one Parliamentary enactment such primacy over another in absence of any specific legislative statement to that effect.
134. Neither Act contains any explicit or implicit recognition of the primacy of the *CLM Act* over the *ALR Act*. Any such legislative recognition does not exist yet the LNP process has proceeded on an unstated assumption that the *CLM Act* “wins” over the *ALR Act*. This is an incorrect assumption with no legal or factual foundation and has created a false dichotomy in the program design and delivery.
135. On a different issue relating to the *CLM Act*, the role of Local Councils in developing Plans of Management for Ministerial approval and then long-term implementation will reduce one of the delays that occasioned significant criticism from Councils. These delays arose from the necessity for a Local Council to seek Crown Lands’ consent to create or alter infrastructure on land that the Council managed and for which it was, for all practical purposes, the sole manager.
136. There were multiple and repeated complaints by Councils of delays of over 12 months to obtain consent for simple operations such as erecting a shade shelter in a playground. Further complaints were that requests were completely lost in the system and 12 to 18 months would pass before they were advised that their repeated requests for a response were not going to elicit any approvals as the initial request could not be found. Then, they were required to start all over again and possibly wait another 12 months for a simple addition to public facilities. The related red tape created a time-consuming and frequently

¹⁷ Published latter part of 2017.

frustrating process. The transitional provisions now in place and the new Plans will end this cause of delay for straightforward community development steps to be taken by Councils.

5.5 Role of Local Councils

137. The ongoing role of Local Councils in the overall LNP is a factor that has not garnered as much criticism or calls for change by those participants as the Aboriginal land claims issue discussed elsewhere in this Chapter.
138. However, some of the issues such as unannounced changing of the goalposts with the cap, unilateral Crown Lands' changes, delays and resourcing issues are relevant to Councils too.
139. The land transfer issues are less controversial as they frequently involve parcels of land such as parks and sports grounds which would be considered to be Council land by even an informed community member. Councils undertake all development and provide equipment and maintenance. Crown Lands plays no role in creating a safe playing or other environment and expend no funds.
140. In May 2018, a Departmental fact sheet *Vesting Crown land in local councils* and *Guidelines* were published. As part of the description of the LNP, the *Guidelines* stated:
- For vestings in local councils that occur as part of the program, the following specific considerations must be addressed:
- operational land and community land...
 - Community Engagement Strategy...
 - native title...
 - Aboriginal lands claims...
 - council consent...
141. The fact sheet described the LNP process as:
- Voluntary negotiations are held... to consider Crown land in a given area and explore which party may be best placed to own that land in recognition of their interests in the land.
142. The bulk of land being considered for transfer is categorised as “community land” which means that the Council has to retain title in perpetuity and to use the land for the benefit of the community. A tiny proportion of land could be transferred as “operational land” and Council can sell that land to private corporations for any approved use, including commercial developments such as a supermarket or a hotel.
143. One reason for the ongoing involvement of Councils is to gain title for land they already completely manage and control but for which they need consent from Crown Lands to make any changes or additions as set out above.

144. Some parcels will create new obligations for a Council and there have been some concerns expressed by some interviewees that Councils may take on greater financial liabilities than they can properly cover, even though well-intentioned in their planning.
145. There are other categories of land that Councils manage which can be transferred and there would be no difference to the Council's budgetary position as they already carry the full financial and administrative burden and Crown Lands plays no role at all. These properties include landfill and cemeteries.

5.6 Only ALR Act claimable land included?

146. It is possible that some of the confusion about the LNP and its potential for achievements has been compounded by the revolving Crown Lands' staff at a senior and middle management level.
147. Some bureaucrats have expressed strong views that LALCs obtaining non-claimable land transfers was the "benefit" of the LNP to those LALCs and the principle motivation for some of them in joining the pilot. The unclaimable land inclusion introduced a bargaining process also, with Crown Lands identifying those other land interests as a trade-off for some claimable land.
148. Further, there seemed to be a view held by some people in the negotiations that ALAs are a mechanism for extinguishing existing or future land claims. This is a misunderstanding as ALAs are designed as a voluntary mechanism for a strategic approach to multiple Land Claims over co-joined land or single parcel Land Claims and to resolve some outstanding Land Claims. ALAs were not designed to provide a replacement mechanism for section 36 *ALR Act* claims *per se* and cannot be proceeded with on such a flawed understanding of the real nature and content of *ALR Act* claims. While ALAs may be part of the overall resolution of unresolved claims, they are not and cannot ever be the total answer to this issue. Other mechanisms, including a political, bureaucratic and fiscal focus and commitment, are required to address the plethora of unresolved claims, many of them decades old.

5.7 Interests-based negotiations

149. Various participants and facilitators reported that the opening session of the initial and most subsequent face-to-face negotiation sessions included a directive address that this was an interests-based negotiation and so as a starting point, each party needed to identify its interests both generally and in relation to individual parcels. This was presented as a fixed and pre-determined position and was not open for discussion or alteration.
150. Interests-based negotiations are a well-recognised form of negotiations or mediations.
151. Negotiation training was delivered in February and March 2018 to the LNP team (as then constituted) by an external consultant, with sessions led by an external

mediator. In a *Negotiation Training – Workbook* apparently distributed at these sessions, under the heading “Negotiation – Interests” appears:

INTERESTS

What is it that brings us to the table? Needs, concerns, goals, hopes and fears that motivate us to negotiate.

We want an agreement that

Satisfies **INTERESTS**:

Ours – well

Theirs – acceptably

Others – tolerably

GUIDELINE: unpack positions to focus on interests

Why should you meet the other party’s interests?

Think about both process and content options.

Don’t just compromise create value.¹⁸

152. Further, in the *Workbook* is a checklist for the 7 Elements earlier identified¹⁹ as Interests, Options, Alternative/NDO, Standards, Relationship, Commitment and Communication. In relation to the first identified Element of Interests:

Element outlined: The needs, wants and fears which motivate a person to negotiate.

Consider: Have the parties identified their own and each other party’s interests on each issue.

Practical suggestions: Ask “Why?” to get from positions to interests.²⁰

153. In correspondence from the then Group Director Governance & Strategy on 2 July 2018 to a LALC, the “Minister’s position” was described as:

As previously discussed, this is an interests-based negotiation. Interests-based negotiations are where parties collaborate to find “win-win” solutions. This strategy focuses on developing mutually beneficial agreements based on the interests of the parties.

The [[town]] negotiations are about finding the best owner and manager for land in the [[town]] area to benefit all parties and the community, recognising the specific interests of the participating parties.

¹⁸ *Negotiation Training – Workbook* at page 11.

¹⁹ *Negotiation Training – Workbook* at page 10.

²⁰ *Negotiation Training – Workbook* at page 24.

154. The drawback with this limited approach of interests-based negotiations is that it completely fails to identify and then address the fact that one party, the LALC, may have some substantial legal rights and remedies to a claim or a potential claim pursuant to section 36 of the *ALR Act*. Further, the potential for an agreement pursuant to section 36AA gives rights also.
155. A restricted interests-based negotiation without any recognition of these legal rights has built an inherent flaw into the structure of the whole process.
156. A cited reference in the *Workbook* is the research discussion paper *Scoping Process Issues in Negotiating Native Title Agreements* by Ms Delwyn Everard. While focussed on Native Title rights and issues, the author addresses some pertinent key negotiation concepts:

Negotiation is the process of interaction between parties seeking to reach an agreement. Negotiation theory recognises several different strategies:

- In **'rights-based' negotiation**, the parties focus on determining the scope and strength of their respective legal rights in order to agree how outcomes should be allocated...
 - In **'power-based' negotiation**, the outcome is determined by the party with the upper hand- through possessing greater resources more information, stronger legal rights, more media influence or another source of power...
 - **'Positional' negotiation** is a bargaining process in which each party states its demands or positions and then engages in a series of trade-offs...
 - In an **interest-based negotiation**, the parties seek to articulate the interests or concerns that are their motivators for seeking a specific outcome, and then work to generate options for agreement which meet their own needs and concerns in a way which least undermine or diminishes the needs and concerns of the other parties.²¹
157. The creation and pursuit of a particular model, at the expense of the other possible models, has eliminated any discussion on the appropriateness of that model and whether it is the most useful or beneficial model for all participants and an outcome appropriate to the individual circumstances.
158. The structural flaw in an only interests-based approach to negotiations is that it is based on an obliteration of the rights created by the *ALR Act* by setting up a "competition" between the parties to justify and explain their interest in particular parcels and then some negotiators determining who "wins". This approach misconstrues the very foundation of the *ALR Act* by failing to accord to the Preamble or the purpose of the *ALR Act* as expressed in section 3 any meaning and consequence.

²¹ Everard, D, *Scoping Process Issues in Negotiating Native Title Agreements*, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2009, at page 10.

159. To give due and proper recognition to Parliament's intention, the more appropriate approach would be to assume that land nominated by a LALC should be returned to that LALC unless there is a significant and real reason for that not to occur, such as that the land is genuinely needed for a public purpose. If that assertion is to be relied on by the Crown Lands negotiating team, then it needs to be able to be verified by the other parties and reviewed. As discussed elsewhere, public use such as access to a beach, can be lawfully and enforceably secured by other means such as an easement or a licence.
160. The basic principles that all "Land in New South Wales was traditionally owned and occupied by Aboriginal persons"²² and that all land is culturally and economically significant for Aboriginal communities needs to be the starting premise of all negotiations. Currently, the way that the negotiations have been conducted fails to accord any recognition to those fundamental principles.
161. This failure may be ascribed to the way that the LNP initially developed as a program of negotiations between local councils and Crown Lands to transfer land to local councils. LALCs were "tacked on" to the program after the initial development phases were completed – a step described as an "afterthought" meaning that the necessary careful analysis to ensure all existing legal rights and interests were recognised from the commencement of the program did not occur.
162. This history is reflected in Government publications. For example, the Departmental *Fact Sheet – Land Negotiation Program*²³, stated:
- The LNP delivers on the NSW Government's commitment to ensuring Crown land is held by the most appropriate landholder to achieve positive social, economic, cultural and environmental benefits for the people of NSW. The LNP was established in response to recommendations from the Crown Land Management Review.
163. The term "appropriate" is a misrepresentation of the legal rights for Aboriginal communities under the *ALR Act* and dismisses that significant factor. Also, "the people of NSW" as the sole focus elides the rights of Aboriginal people for compensation for their loss of all traditional lands which is the basic tenet of the *ALR Act*.
164. The Crown Land Management Review explicitly sought not to make any substantive comments or express any positions about Aboriginal people in relation to Crown Land. Proceeding on the White Paper and the "Government Response" documents was misguided in the context of Aboriginal rights and interests. The Parliamentary Standing Committee, on the other hand, provided thoughtful consideration of perspectives relevant to this issue and upon this, and made its recommendations as discussed in Chapter 3.

²² *ALR Act*, Preamble (1).

²³ Department of Industry, March 2018, emphasis added.

5.8 Assisted negotiation process

165. The negotiation process was designed as an assisted negotiation process through the use of an independent facilitator. A mediation process with an independent mediator playing a more interventionist role with a capacity to issue binding directions was eschewed.
166. There were different facilitators for each of the four pilots. Each had a different work experience history and brought different skills to the task. There were no guidelines or framework provided to any of these facilitators other than the general principles document. There was some limited personal interaction between the facilitators which was initiated by the facilitators themselves.
167. The method of selection is opaque. There was apparently a limited call for facilitators by Crown Lands but the other parties were presented with a list of nominated facilitators only. Their only role was to select one facilitator from the pre-determined list.
168. There was no workshop or other mode of communication established so that the parties could not benefit from each other's experiences to avoid potential pitfalls or adopt successful strategies. Even by late 2019, there had been no attempt to draw their experiences together to provide a template going forward. No such development opportunity had ever been suggested so this Review cannot be identified as a stalling mechanism.
169. This lack of a unified or even a co-ordinated process means that there has been a lack of common goals and methods across the pilot teams, inevitably leading to double-testing of concepts and wasted time and resources on unsuccessful or failed approaches. It is beyond the scope of this Review to identify or develop a framework or structure to assist in further negotiations. However, there is a pool of deep experience and significant goodwill held by the facilitators which should be drawn together to provide some modelling options to save time and resources for all parties going forward.
170. Any such template for the appropriate approach to LNP negotiations would need to take account of the other recommendations in this Report which are accepted and act upon them accordingly.
171. The model of the negotiation process is discussed above at Chapter 5.7.

5.9 Unequal parties

172. At the core of the negotiation process is the different roles and functions of the three individual parties: the NSW Government through the Departmental negotiating teams, the Local Council and the LALC, assisted by NSWALC.
173. It is beyond dispute that the design of the process has led to an obvious disparity between the parties.

174. However, that disparity was built in from the start, although unacknowledged to the parties or publicly. As one bureaucrat explained:

Well I think you probably have to accept that whenever you are negotiating with the State that there's an imbalance. I think that the State is always going to have greater resources to negotiate but has to be more mindful of that imbalance.

175. The imbalance is more than a resources question. The lack of collaboration or discussion on the process itself is one indicator of the control of the State.

176. As discussed below, the Department has made unilateral decisions about some substantial portions of lands which are not to be included at all, including coastal areas and TSRs. These areas were the subject of unilateral announcements.

177. The "cap" issue is another example. The existence of the cap and the significant ramifications it could have were not announced at the beginning of each process and were later revealed in an *ad hoc* and varying way with a lack of transparency about the cap's rationale and potential impact as discussed below.

178. Timing and processing were controlled unilaterally by the Department's negotiating teams. For example, at one meeting, certain parcels of land were identified as being the focus of the next meeting. The other two parties, especially the resource-stretched LALC, often undertook substantial work to develop positions on those parcels only to arrive at the next meeting to be met by a unilateral announcement that now other parcels would be examined, not those previously indicated. There was no mechanism to make the Department's teams accountable or for them to be required to return to the previously nominated parcels as the facilitators did not have that power and the other parties certainly did not.

179. There were other assertions of control which were seen by the other participants as indicators of power. There were multiple reports of some of the Departmental teams arriving late and leaving early for meetings.

180. The other participants had set aside the whole allocated time. Some Aboriginal participants saw this casual approach to time as a lack of respect to the Elders and Traditional Custodians present. They considered that by their actions and the lack of any notice or communication about changes in schedule, that the late attendees' time was more important than the other participants.

181. Whatever the explanation for each individual occasion, there was a pattern of conduct repeated over many months in different negotiations, which implies an arrogance of power and a total lack of respect for all the other participants, including the facilitator. Where parties are equal, then such a pattern would not be tolerated or able to be continued without negative ramifications.

182. Some Aboriginal interviewees had a clear view about these and related occurrences. After long histories of dealing with the lands department in various

guises, they are reluctantly used to being treated as second class citizens or persons with no power or rights. This seems to have been the culture of Lands agencies over many years and there has been no apparent change in its approach. The absorbed culture of even new bureaucrats is that they are the ultimate and only power – and are seen by many Aboriginal people as merely a new form of colonialists, continuing the practices of refusing to provide compensation for the theft of land and refusing to acknowledge or act upon the rights of Aboriginal peoples, even where those rights have been statutorily conferred. This long-term culture is seen by many outside the NSW bureaucracy as particularly prevalent in the land agencies and sectors within the NSW bureaucracy as well as in agencies dealing with family and community services.

183. One Council participant noted: “I think it was very clear that Lands were the leader of that negotiation and where they felt the land best sits or best sat, was where negotiation kind of ended”. A LALC attendee said during a negotiation meeting: “Well, what you are saying is that you’re the biggest kid in the sand pit and you will get what you want’ and they said, ‘yes’ to that.”

184. Another LALC attendee and interviewee said:

The Department struggled to engage with LALCs at a level that provided comfort to the LALC. The Department’s demeanour generally made the LALC feel inferior during negotiation meetings. The Department came across as the “Superintendent” rather than a party to the negotiations.

185. For some unstated reason, despite clear objectives for economic development of each Aboriginal community, when commercial operations were proposed then the parcels became less readily obtainable through the negotiations. Such unstated opposition is contrary to the Government’s objective for independent economic bases for Aboriginal communities and should not be permitted to pollute or influence the negotiation process in any way.

5.10 Conflict of duties

186. Related to the unequal bargaining positions of the parties was the multiple roles performed by the Departmental teams with no apparent overview or more senior person or agency to intervene in the case of any conflicts.

187. While not a classic example of “conflict of interest” of say a legal practitioner conflicted between a client’s interests and personal interest, the blurring of various roles occurred.

188. One role of the Departmental team is as the representative of the NSW Government overall. A role that may be different, or at least have different immediate interests, levels of knowledge and transactional priorities, is direct management of Crown Lands. The NSW Government, through Cabinet, may have broader and more flexible and nuanced interests than those of the individual Crown Lands teams with a narrower focus.

189. The absence of any visible involvement of senior Government officials in the LNP created the impression that the Crown Lands negotiating teams and other occasional participants were the only ones involved from the NSW Government side. The powerlessness of the purported Governance Committee²⁴ did not provide any alternate avenue or an antidote.
190. Other avenues for not placing all responsibilities in relation to the LNP on the Crown Lands negotiating teams alone are discussed in Chapter 6.

5.11 Confidentiality

191. The Crown Lands teams imposed strict confidentiality requirements on all participants in the LNP process. This was claimed to be essential for the ongoing negotiations, although the foundation for that assertion is opaque. This insistence has had a number of ramifications, all negative.
192. While acknowledging that caution needed to be exercised with the conveying of information to others, there needed to be some sensible guidelines that permitted some information to be conveyed on a confidential “need to know” basis to some others.
193. Two clear examples are the Board members of LALCs and the Councillors or a committee of Councillors of a Local Council. The approach envisaged and insisted on by the Crown Lands negotiating teams was that only those in the negotiating room could know what was going on. This Report has reluctantly followed that restriction in order not to jeopardise any of the currently ongoing processes.
194. There are multiple ways to present information to others without revealing precise details such as land parcel identifiers. The difficulty for Council and LALC staff and consultants is that ultimately the Council and the members, respectively, have to sign off on any proposed deal. If they have not been able to be informed of the process, the rationale for various decisions, and the criteria being imposed, then they can only be presented with an outcome and “take it or leave it”. This is a brinkmanship that is unnecessary and could be counter-productive.
195. A less rigid approach where the major considerations and factors would be discussed with the approving agencies of at least LALC Boards and a Committee of Councillors would ensure that the agencies were properly informed and involved until the first set of land transfer details were available for detailed and wider discussion.

5.12 Governance Committee

196. The LNP has a Governance Committee, with representatives from NSWALC, the Department of Premier and Cabinet (**DPC**), Aboriginal Affairs and Crown Lands.

²⁴ See Chapter 5.12 below.

197. The terms of reference for the Governance Committee are:

To provide advice and recommendations to the NSW Department of Industry – Lands to assist with the operation of the ALA program by:

1. Considering, assessing and providing advice and recommendations regarding prioritisation and selection of parties and areas to enter into ALA negotiations.
2. Considering, assessing and providing advice and recommendations to implement a capacity building program to support LALCs participation in ALA negotiations.
3. Providing advice and recommendations regarding the conduct of ALA negotiations.
4. Advising and supporting the evaluation of ALA negotiations and outcomes.²⁵

198. In May 2018, the *Aboriginal Land Agreement Funding Guidelines – To Assist Local Aboriginal Land Councils to Participate in the Land Negotiation Program* were published by the Department. The *Guidelines* stated:

THE ALA Governance Committee (the Committee), consisting of representatives from NSWALC, Department of Premier and Cabinet, the Office of Aboriginal Affairs, and Lands, is responsible for overseeing the operation of the Aboriginal Land Agreement (ALA) program. This includes providing advice and recommendations to Lands to assist with the operation of the ALA program. As part of this, the Committee will be informed of approved funding and will be asked to provide advice and recommendations on the funding processes and any issues with funding that may arise.

NSWALC can bring concerns raised by LALCs at any time about these funding Guidelines or funding more generally to the Committee. LALCs can also raise concerns directly with the Committee and may attend Committee meetings to raise these issues.

Although the Committee only has scheduled meetings every second month, members are happy to hold out of session meetings to consider urgent LALC issues.

199. While not designed to provide an independent review mechanism, this Committee had the potential to provide some views and advice external to the Crown Lands teams on thematic issues as they emerged and assist in addressing some of the inequalities as addressed above/below.

200. However, this is not the way that the Crown Lands teams have elected to use the Committee. It has been given limited information and no real role to express views on critical issues, for example, the cap or the land to be removed from the negotiations.

²⁵ ALA Governance Committee Minutes of Meeting No 2.

201. The only substantive role that the Committee has been “given” by Crown Lands is the allocation and funded use of resources by LALCs in the negotiation process.
202. An effective overview mechanism could perform a substantive and positive role and this issue is discussed in chapter 6.

5.13 Delay

203. The LNP process has been an unwieldy and slow process and not in line with the timing as originally envisaged and proposed by Crown Lands. There are a range of different factors involved, some of which are addressed elsewhere in this Chapter.
204. As one Council interviewee noted, the process was “very lengthy and probably unnecessarily lengthy”. A LALC attendee observed:

The Department was totally unprepared for the negotiations. They did not have all documentation available for the parties (e.g. grazing licences and leases were not made available before negotiations). This made it impossible to assess the land from a LALC perspective. How could this result in LALCs and local councils being fully informed?

205. The initial internal proposal for the LNP in September 2015 included that there would be “staged commencement of Local land transfers, to commence in 2016 through voluntary negotiations between the State, the four Local Land Pilot Councils and LALCs”.
206. The commencement period of 2016 - 2017 was dubbed “Stage 1” in the April 2016 Departmental documents. Stage 2 was proposed as 2017 – 2018. This period was designated as the period for “the implementation across four pilot Council areas”. Further, it was said that “this framework has been designed in accordance with the Department of Industry *Program Evaluation Framework* and the NSW Treasury’s *Guides for Agencies Preparing Performance Information*”.
207. The proposed measures were Key Performance Measures of outputs “for the assessment of this program to demonstrate whether it is having the intended short-term effects”.
208. The lack of even one land transfer in any of the pilot areas by January 2020 demonstrates the failure of the projected outcomes. There are several reasons for those failures, including lack of transparency and the non-negotiable directions.
209. The Departmental *Fact Sheet* dated March 2018 stated:

The LNP commenced in 2016 in three local government areas of Tweed, Tamworth and Northern Beaches. In November 2017, the Minister for

Lands & Forestry approved 16 new areas to participate in the program, with five commencing in 2017-18, five in 2018-19 and six in 2019-20.

210. As at March 2018, this was a doubtful assertion as to the events that could be envisaged for the then current financial year of 2017-18 and forthcoming. The history of the LNP was that Tweed LGA exited the pilot shortly after its announcement and other LGAs were then included.
211. One facilitator observed that without an overall strategic plan with a process set out and an operational plan with timelines, there was no proper framework within which to operate. As such, “changing goalposts” and the absence of senior decision-makers resulted in a time delay on all steps with no urgency in the absence of any identified, public timeframes.
212. There was considerable delay before the actual negotiations commenced. Prior to the commencement of the formal negotiation meetings, there were informal meetings between the participants stretching over many months. As a Council interviewee explained, out of a total of 23 meetings, 10 were preliminary and:

We spent a lot of time relationship building before we actually did start with the actual negotiation process and we had a lot of sessions with them just talking through the process, getting to know each other, getting to know each other’s roles in terms of each other’s roles... [One CL team member] has been very good, actually all of the Crown Lands people have been good to work with and as much as they can be, they are very open and transparent in terms of explaining what they’re doing, even when there’s something difficult like the cap or where they can’t say, you know, obviously they have got instructions to not go beyond what they can tell us, then they are very open about, and transparent about what they can tell us.
213. The facilitator did not get involved in the preliminary meetings and entered the process after that was completed, in some instances this was 12 months or more after the first meetings.
214. Some negotiation sessions had monthly or bi-monthly face-to-face sessions with a joint tele-conference in between. There were some individual meetings with a facilitator and to a lesser extent between the non-Crown Lands parties.
215. However, in the over three years since the inception of the program, there has not been one land transfer in any of the pilot areas that is directly attributable to the LNP.

5.14 The “Cap”

216. One contentious issue with the LALCs and Local Councils has been the unilateral imposition of the “Cap” (so-called by the Crown Lands teams) or the limitation on the deemed cost of land that can be transferred under the LNP. Essentially, the cap has been represented as a limitation imposed by NSW Treasury on the quantum of the land that can be transferred as the removal or

deduction of that cost from the overall quantum of the State's assets will have a detrimental or negative impact on the State Budget and financial health. Further, this was presented as a non-negotiable item and not open to any discussion or queries.

217. Obviously, there are various different components in these assertions which need to be unpacked, as far as possible.
218. One critical factor in the other participants' understanding of the cap and the potential impact on the negotiations was timing. The cap was not raised at all either generally as an issue or specifically to the negotiations in question until months into the negotiations. The time at which they were advised varied within the pilot participants. This was widely seen as one of the major factors leading to the breakdown in the views of the other participants as to the genuineness of the Department in conducting an effective land transfer program.
219. As the cap was included in the process from the initial approved proposals in April 2016, this failure is a serious defect in the negotiating process.
220. Due to the imposition of strict confidentiality requirements on the land values, it is not possible in this Review to traverse the quantum proposed for the total annual land transfers for each year spread over a four year period. Suffice to say that those figures were never released to the other parties. Further, the rationale and approach to land valuation, the actual value of individual parcels to the Crown Estate, and the annual cap imposed on the LNP were unable to be ascertained by the parties and remain unavailable during this Review process.
221. The actual process undertaken by Treasury to arrive at the value for individual parcels is not open and transparent. Therefore, the other parties have no access to any review mechanism to examine the costings being applied to the land they have identified as being part of the transfer package.
222. As no land transfers occurred under the LNP at all during that period, these figures, which were speculative, are not accurate, even as guess-timates, for the costs associated with earlier financial years.
223. In one pilot program, the cap was raised after 12 months of active negotiations. The Crown Lands team were described as "apologetic" and said: "We were unaware of this ourselves".
224. One substantial impact has been that if the cap had been revealed in quantum at the commencement of the negotiations, then the other two parties could have looked at the entire LGA and determined the most critical ones in order to commence negotiations in relation to them. Instead, a path whereby the Crown Lands teams selected the areas with no articulation of the cap and its impact on the whole, proposed four year period meant that the process was based on an absence of critical information and so in essence commenced and continued on a false premise. Interviewees described the process as conducted variously as "dishonest" and "unfair".

225. Apart from the unnecessary lack of transparency of this issue, there are more fundamental issues as to the whole process of establishing the value of the land to be transferred and the current value given to the land. NSW Treasury is responsible for the overall valuation with some Departmental assistance.
226. Some participants have raised the issue of the actual land valuation itself. No actual value for individual or group land parcels was provided by the Crown Lands teams to the other participants. The only advice was that individual parcels were low, medium or high value. If an independent valuation was obtained by a party, there were some indications from the Crown Lands teams that the valuation figure in question was considerably higher than the value they had on that portion of land but no figures were actually revealed.
227. Significant portions of the land being considered for transfer have no real or realisable commercial value due to planning restrictions on the title. They are designated as “community land” and are transferred at nil cost. In the absence of any commercial negotiations around the land value, all values are merely speculative and not based on any realistic or commercial value.
228. There has been a significant impact on the negotiations on the Northern Beaches Council and the Central Coast Council areas because of the cap. Randwick Council area is also impacted going forward. Young LALC were advised that the cap was not an issue in their area, presumably because of the deemed low value of the land in question.
229. One facilitator described the impact of the late introduction of the cap as:

And the issue was that it goes against the spirit of the program, because it's meant to be every option is on the table. You know, land going back to local communities, whether it be council, land council and this was a barrier to that. But secondly, the information that the department were able to give was confusing and unclear and at times contradictory and I don't think that was any fault of the people in the room. I think they were possibly getting – I think they were being specifically told what they could or couldn't say and sometimes that meant that – I think it was the appearance of the contradiction, rather than the contradiction itself. So there were questions, 'Does this cap apply to the whole program? How is that divided between each of the negotiation programs?' That was all very confusing. The figure couldn't be given. It was unclear whether the figure was available for the negotiation and couldn't be given or whether it just wasn't available. That was all quite grey and murky...

We did get to the point though of knowing how many of the parcels we'd agreed for the transfer to date and how much percentage of the cap that took up. We suggested there was a specific allocation for our negotiation program but wasn't explicitly couched in those terms and an indication as which parcels were high, medium or low value and how much relatively they took up, so that we sort of developed a process and this was with a lot of back and forth between the parties and myself and the

department, to get to the point of having some functional way of knowing if we've breached the financial constraints – which parcels we would need to pull out of the deal to get under the financial constraints. We got to the point of having a way we could do that, but that took a long time.

231. One side effect of the late advice to the other parties about the cap was the shift in the content of the discussions. For example, in one pilot it was understood that “everything would remain on the table while the whole thing was finalised”. Then, this understanding changed during the process and the push was to finalise the “first portions”, sign off the agreements and transfer that land rather than wait any longer in case it did not happen. The cap meant that the land being discussed was reduced in size, and hence usually in value, and the broader discussions were curtailed.
232. Also, Land Claims under the *ALR Act* cannot be determined by an application of the LNP cap as there is no overriding legislative basis to do so. To attempt to subvert the true operation of the *ALR Act* by closing off decisions that could properly be made is to thwart the operation of the *ALR Act* with no Parliamentary basis to do so.
233. Further, the *ALR Act* does not prevent the transfer of “valuable” or “high value” Crown Land. If only low value land could be transferred, then this would raise substantial inconsistencies with the objectives of economic development and compensation for Aboriginal communities. It is not a permissible consideration in section 36(1) of the *ALR Act*. The LNP should operate in both manner and form consistently with section 36 and the Preamble and Purposes of the *ALR Act*.

5.15 LALCs - Abandoning claims in perpetuity

234. A significant and ongoing controversy is a requirement or immovable demand that a LALC give up any future claims over other land in the negotiation area in return for the transfer of title for some specified land. The parameters of this part of the negotiation have been variable and changing. There is no similar requirement or demand on Councils and there is no available explanation for the difference in approach apart from the terms of section 36AA(1)(b) of the *ALR Act* which has a narrow ambit of lodging or withdrawing a claim over “specified land”.
235. Some LALCs have significant and ongoing objections to agreeing to no claims in perpetuity, and consider this as being a form of inter-generational neglect or removal of rights for later generations. To date, NSWALC has indicated strong resistance to the “no claims” contention.
236. A further concern is that if the use of the Crown land for an essential public purpose ceased, then that parcel of land could become claimable pursuant to section 36 of the *ALR Act*. However, any agreement in perpetuity would prevent a fresh claim that met the current statutory criteria from being lodged.

237. The envelope of the in-perpetuity claims is variously described. Some LALCs perceive it as all land ever discussed at all, even if not proceeded with while others consider that it is, or should be, only for the land within the immediate vicinity of any agreed transfers and within the context of the negotiations. If the latter is to apply, then clarity and specificity will provide some safety to the future of the land process. Other LALCs consider that the requirement means that there is no ongoing benefit for their LALC and that relying on the *ALR Act* claims process will be the only way forward even if it means that there will continue to be substantial delays in finalising claims. This is considered to be worthwhile when weighed against the permanent loss of the potential for a claim even when the use changes.

238. In its submission to this Review, NSWALC noted a further issue:

A broadscale approach to this clause is unjust and undermines Aboriginal land rights as intended by the NSW Parliament. Furthermore, the clause serves as a disincentive for the State to manage the Crown estate lawfully. Land is only able to be claimed under the ALR Act if it not being used for an essential public purpose. The “risk” of a claim under the ALR Act is an incentive for the Crown to put that land to good public use. Removal of that risk through a no future claims clause, removes that incentive.

239. The only clear statement of Crown Lands’ intention was in a letter dated 4 June 2019 from the (then) Executive Director, Department of Industry – Crown Lands, to the (then) Chairperson of NSWALC which stated:

The New South Wales Aboriginal Land Council (NSWALC) has informed the Department of Industry (DoI) – Crown Lands that it does not support the standard inclusion of a clause in Aboriginal Land Agreements (ALAs) made within the Land Negotiation Program (LNP) that would see Local Aboriginal Land Councils (LALCs) and NSWALC agreeing not to lodge new claims over certain Crown land in perpetuity.

DoI Crown Lands’ position is that in return for divesting a significant amount of high value land to a LALC through a LNP negotiation, it is reasonable that the land retained by the State within the negotiation area is no longer subject to Aboriginal land claims (ie. In perpetuity). This is a key objective of DoI Crown Lands when negotiating ALAs through the LNP.

DoI Crown Lands acknowledges that the current LNP negotiations vary significantly in terms of scope (area and value). While DoI Crown Lands will in all instances seek an undertaking that certain lands within the negotiation area is longer subject to Aboriginal land claims, the scope of those undertakings being sought may vary.

240. This correspondence raises a number of interesting issues. In a careful review of available “key” objectives of ALAs negotiated through the LNP or more broadly the LNP itself, no such objective can be readily identified.

241. If the requirement for no future claims was limited to the finite area being negotiated with a clear delineation by DP and Lot number and with an agreement that if there was a change in the use of the Crown Lands included in the area, then the bar could possibly be reconsidered as a potential way forward. However, abandoning any potential Land Claims over the substantial parts of an LGA in exchange for a small number of blocks is not equitable or realistic and seeks to abrogate the intention and terms of the *ALR Act*.
242. In the absence of any similar limitation being imposed on Local Councils, there is no apparent proper policy basis which can justify the continuation of the demand for an in perpetuity bar on Land Claims or other negotiated land outcomes by LALCs.
243. Currently, it looks like extremely poor policy approach with no proper justification. Further, as constructed, such an approach raises serious issues as to potential breaches of the *Racial Discrimination Act 1975 (Cth)*.²⁶

5.16 Exclusion – State significant land

244. The LNP was developed in part on the basis that there were parcels of “State significant land” which were not to be included in the negotiations process, that is, they were totally excluded and “off the table” at all times.
245. The Crown Lands teams presented these different criteria in different ways and individual categories are discussed below.
246. Of critical importance is the determination that once certain land was classified as State significant, then that land was not part of the negotiations. There was no review of the process whereby that land was nominated and accepted as within that category by either of the other parties to the negotiations.
247. This lack of transparency meant that there were serious misgivings held by the other parties as to the validity of the process.
248. One important factor is that there are other legal and enforceable means to secure access to areas such as beaches other than just maintaining title. Properly drafted and agreed easements are one legally enforceable mechanism between the NSW Government and an individual LALC which could maintain access to a beach for the public to use, for critical infrastructure to be maintained and for essential services to be delivered. Indeed, properly managed assets would mean that a member of the community would not know and would not need to know the identity of the holder of the title. There are examples where LALCs currently hold title to beaches where there is unimpeded community access with no problems having arisen.

²⁶ See, for example, *Wotton v State of Queensland (No. 5)* (2016) 352 ALR 146.

249. The absence of any capacity of a LALC or a Local Council to review such a decision is a significant loss of rights in the LNP process. It presents a fundamental conundrum between the assertions of untested rights against the possible denial of legal rights and remedies of *ALR Act* claimable land by a LALC.

5.17 Exclusion – State significant land - coastal lands

250. One complete exemption claimed by the Crown Lands teams is under Criteria #6 of State Significant Land for:

Land within the Crown Estate that includes beaches, coasts, estuaries and adjoining, contiguous lands

The Government has an important role in coastal management, ensuring that the public of NSW has access to coastal and estuarine areas, to maintain critical infrastructure and deliver essential services and benefits.

251. In various different negotiation meetings, participants were told that “beaches are out” or similar phrases. Further discussions of the areas to be covered by this exemption was limited and ultimately refused. There was substantial dismay in some meetings at this blanket outcome.

252. There has been a contentious, recent history to this issue.

253. On 21 October 2014, Mr Kevin Humphries, then Minister for Natural Resources, Lands and Water, and Minister for Western NSW, introduced the *Crown Lands Amendment (Public Ownership of Beaches and Coastal Lands) Bill 2014* into the NSW Legislative Assembly.

254. In his Second Reading Speech, the Minister said:

This bill elevates into law the longstanding policy of successive New South Wales governments that beaches and important coastal areas should be retained in public ownership in perpetuity. These amendments will ensure that beaches and beach-related land within the Crown Lands estate is owned by the Minister on behalf of all New South Wales citizens. The bill defines "Crown beaches and coastal land" within the Crown Lands estate and will stop the transfer of such lands into private ownership. The issue prompting this bill is the conflict between the Government's policy of public ownership of beaches and the recent granting of a beach, in freehold, by the courts to a New South Wales Aboriginal land council. There are similar land claims in existence that place in question the ownership of more than 600 kilometres of beaches and coastline along New South Wales.

If the bill is not passed, the Government will be unable to prevent the further sale or transfer of beaches on Crown land to private landholders. The basis of the bill is the principle that beaches belong to everyone,

and should not be owned by any particular individual or groups of individuals...

Public ownership also allows for the recognition of Aboriginal interests by providing for joint management and other mechanisms to ensure culturally significant sites are retained and preserved. With concerns about the capacity of the private sector to maintain publicly significant land to appropriate community expectations, the public ownership of beaches and important coastal land will give the community confidence that these significant assets are preserved for future generations.²⁷

255. The Court decision referred to was a decision of the Land and Environment Court in *Coffs Harbour and District Local Aboriginal Land Council v Minister Administering the Crown Lands Act*²⁸, in which that Court granted a land claim over a beach subject to an ambulatory easement for public access.

256. In further reference to Aboriginal interests, the Minister said:

As I have mentioned, the prompt for this bill is an emerging risk of private ownership of beach land triggered by a recent court decision under the New South Wales Aboriginal Land Rights Act. In layman's terms, the intent of the New South Wales Aboriginal Land Rights Act 1983 was to allow certain "vacant or surplus Crown land" to be claimed and transferred to Aboriginal land councils. Where the land is transferred, the land council is granted freehold ownership of the land. The Government does not regard New South Wales beaches and coastline as vacant Crown land that is surplus to the community's needs. The Government views beaches as a shared community resource for recreation and environmental protection. On this basis, the bill voids land claims to the extent that they are currently lodged on beach and coastal land as defined in the bill and prevents any future claims of such land.

The bill also explicitly provides that no damages or other monetary compensation is payable to Aboriginal land councils as a result of the effect of the bill on these particular claims. The Government agrees that where Aboriginal cultural significance is associated with a beach, then acknowledgment and agreement about this cultural value is explored. This may or may not encompass any native title connections also associated with beach land. The policy that public ownership of beaches is desirable has been held by this Government and previous New South Wales governments and has been reflected in coastal policies since the 1990s. However, this policy was not recognised as sufficient by the courts to prevent the transfer of land in freehold to an Aboriginal land council, which is permissible under the New South Wales Aboriginal Land Rights Act. It is for this reason the policy of public ownership of beaches is being affirmed in law.²⁹

²⁷ *Hansard*, LA, 21 October 2014, page 1489.

²⁸ [2013] NSWLEC 216; (2013) 199 LGERA 372 (the "Red Rock" decision).

²⁹ *Hansard*, LA, 21 October 2014, page 149.

257. Among other amendments proposed to the (then) *Crown Lands Act 1989* was the proposed section 44H which provided, in summary, that a land claim within the meaning of the *ALR Act* “may not be made or granted in respect of Crown beach and coastal land and such land must not be transferred or otherwise alienated”. Clause 63 of the *Bill* set out that the proposed 44H applied to all undetermined land claims at the commencement of the *Bill*.
258. There was significant public negative reaction to the terms proposed in the *Bill*, including but not limited to submissions and public statements from the NSWALC, many LALCs and Aboriginal people.
259. On 4 November 2014, the Government withdrew the *Bill* from the Legislative Assembly.³⁰
260. The blanket exemption for coastal lands from the negotiation process of the LNP means that the same result as the intended amendment *Bill* in 2014 was achieved but without any of the rigor or transparency of a Parliamentary debate and consequent legislative amendment.
261. Hence, a program that was designed at least in part to be beneficial to the Aboriginal community operates entirely to their disadvantage as even land which could be subject to valid Land Claims under the *ALR Act* is not part of the LNP. This calls seriously into question any claims to “good faith” negotiations.
262. The impact of this position is demonstrated in the submission from Darkinjung LALC which stated:

At the outset of the LNP, Darkinjung was advised that no categories of land were ‘off the table’ for negotiation and that the ‘pool’ comprised 1416 parcels. However, the ‘pool’ of land available for negotiation then arbitrarily and without proper prior warning or explanation ‘shrank’ some months into the ALA negotiations, when the Department advised Darkinjung that 1148 of the 1416 parcels of land were ‘off the table’ for negotiation due to them being assessed as State significant land. At the end of the day, the real number of parcels that Darkinjung might possibly receive reduced to approximately 127 parcels (compared with the initial 1416 parcels). Part of the reason for this ‘shrinkage’ was due to incorrect information within the Department information systems. However, Darkinjung notes that certain lands were also deemed State significant, despite those lands having formerly been included in the original list of lands marked as potentially available for negotiation.

Darkinjung notes that 911 parcels of the 1148 parcels of Crown Land that is State significant (and thus not ‘on the table’ for negotiation) is classified as “beaches, coastal, estuaries & foreshores”.³¹

³⁰ *Hansard*, LA, 4 November 2014, page 1983.

³¹ Darkinjung LALC Submission to LNP Review at page 18.

263. One result of the delay of the announcement of the removal of all coastal lands is that some pilot participants had already expended considerable resources in assessing those areas in the LGA. One Council participant described the meeting where they were advised about the total exclusion of coastal areas as:

When we were told that they actually weren't part of the negotiation, at that particular meeting there was a lot of frustration because both the parties had spent a lot of time assessing each of them and came through the process just the same as all these other parcels. And I think the levels of frustration from the Land Council were that much higher because the coastal parcels have a lot of significance for them.

[The Crown Lands team member] delivered the bad news but she was just a messenger because I remember she had to deal with the flack at the meeting, the disappointment and the flack from the Land Council because they were particularly disappointed at that meeting.

5.18 Exclusion – Travelling Stock Routes

264. A total exclusion of Travelling Stock Routes (**TSRs**) from the negotiations occurred at an early time in the negotiations. Obviously, this exclusion had a greater impact on rural and regional participants than metropolitan-based parties.
265. TSRs frequently have a deep cultural connection with the local Aboriginal community through which they pass as they are based on ancient walking tracks which provided the least hazardous routes, linked water sources and presented safe refuge havens for camping overnight or for longer periods.
266. On 28 November 2018, the NSW Government released the *NSW Travelling Stock Reserve Network – Review and Government Response*. The Government's response was more nuanced and considered than the blanket exemption in the LNP.
267. The *Response* noted that:

The NSW Government is committed to maintaining a viable, connected TSR network in the Eastern and Central Division that the community can use for multiple purposes. It will effectively manage those TSRs to ensure rovers, landholders and the community can continue to use TSRs to benefit social, environmental, community and economic ways...

The TSR Review found that TSRs have different values and are being used for different purposes in different parts of the state. In particular, the management and use of TSRs in the Western Division differ significantly from those in the Central and Eastern Divisions.

268. The NSW Government then made different commitments to the TSRs in the Central and Eastern Divisions and the Western Division, as the TSRs in the latter are no longer used for that purpose or accessible to the public.

269. The *Response* acknowledged:

the important connections that Aboriginal people in NSW have with TSRs and will seek opportunities to strengthen engagement with Aboriginal people in the future planning and management of TSRs.

Although the management of TSRs will be based on principles of public access, the NSW Government will continue to recognise the specific rights and interests of Aboriginal people in the future ownership and management of TSRs

270. The *Response* specifically recognised that:

the importance of TSRs to Aboriginal people in NSW is reflected in the Aboriginal Land Rights Act 1983, which in some cases permits Aboriginal land councils to claim TSRs and/or negotiate access agreements. The Commonwealth's Native Title Act 1993 also applies to TSRs.

271. This more appropriate approach has not been adopted in relation to TSRs. The position that no TSRs can be considered as part of the LNP has continued, despite that position being in direct contradiction to the general NSW Government policy on TSRs.

5.19 Exclusions – State significant land – racecourses and showgrounds

272. A blanket exemption has been imposed for all racecourses and showgrounds from any negotiations as they were asserted to be part of the State “network” of recreational facilities and so within Criteria #2 which is “Land within the Crown Estate that is part of a state or regionally significant system or network...NSW Government should retain responsibility in order to protect these networks and provide public access for the people of NSW”. Some caravan parks were included in this category also.

273. No review or assessment of individual sites was permitted and no traversing of the facts of current or past usage was countenanced. One Council had ownership of the local showground through long standing legislation. This Act was repealed without any advice to the Council prior to the LNP and that showground is now included in the blanket exemption.

274. In some areas, in smaller country towns in particular, individual racecourses or showgrounds have not been used for that function for many years. One racecourse has not had publicly organised and attended races for 20 years. The facilities are used by private operators such as horse breeders and trainers. They provide no publicly accessible facilities.

275. Some Councils are keen to acquire such properties as they could be re-used for a community purpose specific to the local community. Some fall within the area of a Land Claim.
276. An automatic exemption does not appear to be justifiable. If a particular venue is to be exempt from consideration in the LNP, then it should be required to meet a list of established publicly available criteria to ensure transparency. A showground used routinely for many community events could come within the categories for exclusion from the LNP. A showground that holds no community events and has not for many years will need to be reviewed against the criteria to determine its real use and purpose, and not have one ascribed to it merely by its nomenclature.

5.20 Exclusions – State significant land – services stations

277. Criteria #1 for State significant land is “Land within the Crown Estate that currently provides, or is required for, planned core government services and infrastructure” and states:

The Government has an important role providing core government services and infrastructure (e.g. police stations, schools, hospitals, coastal breakwalls and harbours). Planned future government services must be identified through formal plans such as regional growth plans or transport corridor plans.

278. In many rural and regional areas and some suburban areas, the stations previously occupied by the fire, police or ambulance services are no longer used by those services. Many have sat abandoned over a number of years.
279. Due to staffing and rostering changes and the impact of technology in the development of “hubs” for the most efficient delivery of services, these facilities are not required going forward. Some have been sold for private development in recent years.
280. However, a blanket view was taken that all such stations with a previous services use were exempt from the LNP and not able to be considered, even if covered by an existing Land Claim.

5.21 Exclusion - leaseholds

281. Some Crown land is subject to a long-term lease for purposes such as grazing animals or access to other privately-owned lands. Some leasehold land is considered to be of cultural significance by the local Aboriginal community and may be subject to a Land Claim.
282. However, all existing leaseholds of Crown lands are not included in the land negotiations. This is despite the actual title-holder being irrelevant to the protection of the legal interests of any leaseholder, who will continue with the same rights even if the Crown is no longer the lessor. The identity of to whom

the lessee pays rent should have no impact on their ongoing lawful use of the property.

283. If the land is transferred to LALCs, then the existing lease could be transferred and the existing rights such as term, rent, etc. continued. Pastoral or other leases do not form the proper basis for automatic exclusion from the LNP.

5.22 Exclusion – Commons

284. An exemption from any discussions or negotiations on all commons was imposed, that is, property covered by *Commons Management Act 1989* (NSW).
285. Under section 36(5)(b) of the *ALR Act*, the Minister can refuse a claim if satisfied that part or whole of the land claimed is “not claimable Crown lands”.
286. A “common” is defined in section 3 of the *Commons Management Act 1989* (NSW) (**the CM Act**) as a parcel of land which has been set aside as a common for the use of the inhabitants of a specified locality or, in relation to land set aside on or before 1 February 1909, for the use of cultivators or farmers of any locality in which the parcel is situated.
287. Section 4 of the *CM Act* provides that whenever a parcel of land is set aside as a common, the Minister must establish a trust in respect of the common. Section 8 of the *CM Act* provides that a trust established under section 4 has functions which include being “responsible for the care, control and management of the common for which the trust is established”. Section 10 of the *CM Act* imposes a duty on the trust to keep a commoners’ roll for the common, with a “commoner” being defined by the Act as a person whose name is entered on the commoners’ roll. Section 31 of the *CM Act* provides that a trust must, at least once in each calendar year, convene an annual general meeting of commoners while section 41 requires the trust to keep such accounting records as correctly record and explain the transactions of the trust and its financial position.
288. In *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act*³², it was held that the claimed land, which had been set aside as a common, was lawfully used or occupied within the meaning of section 36(1)(b) as at the date of claim.³³
289. At the date of the land claim considered in that case, the whole of the claimed land had been reserved as a temporary common, with the Camberwell Common Trust (**the Trust**) responsible for the common. The Minister produced evidence under subpoena from the Trust, including the Trust’s management plan, annual reports, financial records and commoners’ roll showing payment of commoners’ fees. The Minister’s submissions referred to *Minister*

³² [2012] NSWLEC 174; (2012) 190 LGERA 171.

³³ In another commons case, *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (Boggabri)* [2014] NSWLEC 58; 202 LGERA 273, the Court found for NSWALC and the Minister failed as the licence in favour of the trust was not validly granted, so the decision turned on a narrow factual basis.

*Administering the Crown Lands Act v New South Wales Aboriginal Land Council*³⁴ which held that in determining as a question of fact whether claimed land was lawfully used or occupied, evidence of physical presence upon the land is not needed but may be proved by demonstrating use of the land in a passive manner. The Minister argued that the Trust's documentary record established that the claimed land had been used in a passive manner by, inter alia: livestock being regularly agisted on the common; the Trust holding regular meetings, submitting annual and financial reports, developing management plans and rules, all of which evidenced ongoing activity and use of the common and the Trust incurring regular expenditure related to the common. Pain J held that by this evidence, the Minister discharged the onus of proof necessary to establish that the claimed land was not claimable Crown land under the *ALR Act* as at the date of claim.

290. This case illustrates that where a common has been established within the meaning of section 3 of the *CM Act*, and the responsible trust can demonstrate ongoing activities in relation to the common, then this may be sufficient to establish lawful use or occupation of the land such that it could not be claimable Crown land.
291. A mere assertion as to the existence of a common is not sufficient. There are significant factual matters to be ascertained before a valid claim for an existing and ongoing common can be determined.

5.23 Exclusions – Scout halls

292. One particular, narrow exclusion was Scout halls. The Councils and LALCs were often in possession of local knowledge that indicated many of the Scout halls were used infrequently or not at all or were used for storage and not any scouting activities.
293. Scout and Guide halls were asserted to have a special status, although the primary focus was on Scout halls.
294. In their submission to this Review, Scouts NSW explained:

... the review of the Land Negotiation Program must recognise the special circumstances of Scouts NSW land as an on-going interest of Crown land that should be protected with special arrangements.

Scouts NSW is extremely concerned that without recognition of the special circumstances of the Scout arrangements, as envisaged by the Standing Committee Inquiry into Crown Lands, that the long-term viability of the Scout community and our capacity to deliver the Scout program will be at risk.

295. Further, they explained:

³⁴ (2008) 237 CLR 285 at [69].

The LNP review mentions the transfer of Crown land to local councils and LALCs. This submission strongly suggests that Crown land should also be transferred to other local and capable community groups such as Scouts NSW and Guides as being valued community members delivering youth activities and programs.

Scouts NSW's overall view on the LNP project as proposed through the pilot programs, and Randwick in particular, is that it is neither appropriate or necessary to transfer ownership to councils or LALCs. This would be to the distinct disadvantage of Scouts NSW's ability to deliver its youth program across Randwick, and should the LNP be expanded, it will place at risk Scouts NSW Crown tenure across NSW.

Scouts NSW sees a quite likely prospect over time under various provisions of the new Act, of losing tenure rights over potentially hundreds of properties currently under tenure from local councils or the Crown. Again, this would of course have a major impact on Scout NSW's ability to deliver its youth programs, and particularly if the current activity proves to be only the beginning of broader and more far-reaching actions.

296. One Council interviewee explained:

Really the only segment of the community that's been consulted and that was not by us - but by the Crown - is the Scouts Association because there is a number of Scout halls that were being discussed and the antedate or information we have and that the Land Council has is that they're underutilising the majority of it and using the storage for example, so they were all on the table for negotiations. Then Crown Lands went and had a number of discussions with Scouts Australia about their use of the Scout halls and whether they could rationalise - whether they could have alternatives to actually using the halls.

And that's the challenge in this process -- it's about ownership for the land, it's not so much about change in activity or use so if ALC is saying if we had the Scout hall, we'd permit them to continue to use it, maybe some rationalisation of how it's used, but I think the scouts are concerned about losing their exclusive use of the space.

297. The views expressed by Scouts NSW are based on their historical positions on existing lands from when they were a relatively large and broad youth organisation operating across NSW. Those conditions have changed and their current membership in numbers and geographical spread are severely diminished from 30 years ago.

298. There is no apparent policy imperative that Crown land which has Scout premises as infrastructure built and maintained by Scouts NSW should automatically be excluded from any negotiations between the parties to the LNP. Their submissions fail to demonstrate any understanding of the enhanced

status of Local Councils and LALCs in relation to land holdings over the narrow, sectional interests of Scouts.

299. Where premises are rarely used and there are a range of other emerging community uses which need to be met, then those need to be fully assessed without any particular group being excluded due to longevity of pre-existing leases or other legal arrangements.
300. Determinations of land which includes Scout infrastructure should be assessed on the same criteria as land use for all community groups and not assigned a special, superior or untouchable status just because it is Scouts.

5.24 Native Title Claims

301. Native Title Claims under the *Native Title Act 1993* (Cth) are available for some land claims in NSW and may cover some of the same land subject to Land Claims under the *ALR Act*.
302. The capacity and willingness to deal with Native Title Claims in conjunction with the LNP process has been seen as a stumbling block to successful outcomes. The approach can vary from region to region as it can involve LALCs and Native Title claimants not speaking with a common voice or able to negotiate between themselves.
303. It is beyond the Terms of Reference of this Review to analyse and assess the various views expressed about the conflicts and difficulties alleged to be created by Native Title Claims when they are in conflict or inconsistent with Land Claims. However, it is noted that there is no State-wide framework for negotiating Native Title Claims, as operate in all other States. This absence of a clear and unified State approach potentially results in *ad hoc* and contradictory decisions throughout the State and a lack of cohesion in the response.
304. It is noted that some of the difficulties expressed by some negotiation participants on this issue appears to be exaggerated and ill-informed as to the reality of the situation within Aboriginal communities. The assessment process for Land Claims needs to include an assessment of Native Title Claims as a matter of course and this step should not be used as an impediment to fruitful LNP negotiations.

5.25 Co-management proposals

305. Some Councils and LALCs raised the potential for co-management of sites that remained as part of the Crown Estate. This approach could mean:
 - a. a joint management agreement over one facility or site, or
 - b. separate management of different facilities within the same part of the Crown Estate.

306. Such proposals have arisen in relation to facilities such as cafes and caravan parks and water recreational facilities within the same area.
307. To date, no such requests to consider such options as part of the LNP have been accepted as they appear not to be considered as part of the project. However, in terms of providing economic benefits to both LALCs and Councils, it could be an important avenue and would further develop local co-operative working relationships between those parties.

5.26 Non-land outcomes

308. Some Local Councils and LALCs reported attempts to discuss non-land outcomes which would provide value to the relationship and the local communities. This approach was consistently refused based on an assertion that only land outcomes were available to be pursued.
309. Other opportunities which could be linked to or be made an integral part of the negotiation process include broader stakeholder consultation, cultural training and targeted employment programs for Aboriginal employees through avenues such as traineeships and apprenticeships with set targets relevant to that local community.

5.27 GST

310. One issue that has become complicated and apparently occasioned some delays is the possibility that the Goods and Services Tax (**GST**) could be payable on any land transfer occurring pursuant to the LNP. If there was such liability, then the further question arose as to the source of funds to pay the amount.
311. Essentially, LALCs were concerned that if there was to be a liability, then they would not have the funds to make the payment and hence would incur an unmet tax liability with potentially serious ramifications. Further, if there was to be a GST assessment and liability, then a LALC needed to incorporate that into their negotiations with Crown Lands as they may not have the funds to meet the tax notice when issued by the ATO.
312. One LALC received a private ruling from the Australian Taxation Office (ATO) which, in summary, ruled that “as there is no consideration for the supply... it does not make a taxable supply under section 9-5 of the GST Act”. In another section in the private ruling, it was said that: “The [LALC] does not make a taxable supply as there is no consideration for any supplies it makes under an Aboriginal Land Agreement”.
313. This private ruling took three months from application to advice. It is difficult to understand the reason that the GST issue held up some negotiations for periods reportedly up to 18 months and resulted in the waste of significant resources and discussions on GST. The resolution was relatively straightforward and simple.

314. Crown Lands received a confidential legal advice from a solicitor's firm through the Crown Solicitor's Office on the GST issues. Due to their claim for confidentiality and legal professional privilege, this legal advice cannot be traversed in this Report.
315. This is an issue which should be readily resolved and should not be the cause of any delay in any further negotiations over land transfers.

5.28 Capacity building and extra resources

316. The initial proposal for the LNP recognised that many LALCs were severely under-resourced and were unable to meet the demands that the LNP would have of them, in order to provide the basis for informed participation. Various resources were envisaged, including legal, planning and management advice. Further, it was recognised that Councils may need support to develop plans of management of the lands.
317. The initial proposal document for the LNP included program costs to provide resources to support LALCs and Local Councils in the pilot program for the negotiations and to prepare plans of management and other special needs.
318. In May 2018, the *Aboriginal Land Agreement Funding Guidelines – To Assist Local Aboriginal Land Councils to Participate in the Land Negotiation Program* were published by the Department. The *Guidelines* stated:

The LNP is a landmark program that among other things intends to decrease the time it takes to resolve Aboriginal land claims in NSW. The LNP uses ALAs to transfer land to, or set up joint management arrangements with,.. LALCs. The LNP will resolve multiple land claims using this process...

The NSW Government wants to ensure all parties to the LNP come to negotiations with the necessary resources, expertise, advice and time to advocate for their goals and needs...

The focus of the LNP is the return of lands to LALCs to provide cultural, social and economic opportunities, while retaining land of State significance in the Crown estate and giving the NSW Government greater certainty about the land the remains [sic] in the Crown Estate.

319. The *Guidelines* list seven categories of pre-approved resources as those areas will be considered approved when a funding application is made. The funding levels and the total costs for some categories are specified. A list of proposed key activities is listed in four phases: preliminary, assessment, negotiation and post-negotiation.
320. A Capacity Building Funding Summary as at 18 December 2019 shows that all LALCs still involved in the LNP at the time of its suspension under-spent their pre-approved amounts by 46%. This means that there were significant funds available to provide vital resources to the LALCs which were unspent or at least

unpaid. As the total amount available was not publicly available, this is unsurprising.

321. An undated Departmental document headed *Land Negotiation Program* and entitled *Legal Advisor Guidelines – Funded Activities Factsheet* advises that there were pre-approved costs for a Legal Advisor of \$45,000 to \$75,000 and listed supported and unsupported Legal Advisor funded activities. Page 2 sets out some “tips” to “manage legal costs”. Some information is then provided on ideas of the best way to manage the LALCs relationship with their lawyers.
322. The assessment of the needs of the parties was global and did not take into account disparities of sophistication of understanding and available internal expertise and resources. As one LALC observed:

The Department has completely overestimated the capacity of LALCs to understand the details required to enter the negotiations...

The funding provided to LALCs during the process was a set amount for each LALC. There was no consideration of the size of the LALC staffing, their experience and knowledge and their understanding of the process. LALCs such as [[small town]] only have a small staff that is, quite often, employed on a part time basis and they have no understanding of land and asset management. Such LALCs require more funding for advisors and capacity building before, during and after the negotiations... LALCs without resources... were placed at a disadvantage as a result.

323. As discussed in Chapter 6, further work needs to be performed to develop models for: (a) resources needed in different circumstances reflective of the expertise available to the parties to the negotiation; and (b) the degree and extent of the negotiation taking place within a specified timeframe.

5.29 Payment of funding grants

324. NSWALC originally paid funding grants to individual LALCs under the pilot program for work done specifically for the LNP from funding provided to it for this purpose by the Department. For various (irrelevant) reasons, this function was passed to the Department. There have been many criticisms of the slowness of the payment system and the unnecessary and pedantic red tape that is applied by the Department. As one LALC interviewee observed: “so it has been really cumbersome and it’s been really slow and been really painful”.
325. At a minimum, invoices took two months to pay and some took six to eight months or more. One LALC observed:

Project Managers and Advisors were not paid promptly. It took the Department several months to set up payments. The process felt like everyone was begging for money from the State...

The Department did not provide standard scopes to consultants but asked the consultants to prepare their own briefs. This resulted in confusion and delays in appointments.

326. A scope of work was required to be developed for each consultant or advisor within the published *Guidelines*. This was not available initially and even when available and followed, did not lead to prompt payments.
327. Most of the consultants are sole traders or in small businesses. They are covered by the NSW Government Faster Payment Terms Policy for registered small businesses. This is supposed to ensure that Government departments and participating agencies pay registered small businesses within 20 business days of the submission of their invoice. This changed to payment within five business days on 31 December 2019. This policy has not been met for any of the consultants engaged by the LALCs at any time.
328. The time spent by planning and legal experts has been challenged as being unwarranted or unnecessary or even as being claims for other work (i.e. not LNP work but general land claims or land portfolio work).
329. One example is that there was significant extra work generated when extra data was added to LandsLink. Although this extra work was generated by the initial lack of comprehensive and reliable data in the LandsLink system, there was no process to accept that a significantly increased workload necessarily arose.
330. One LALC CEO interviewed as part of this Review described the funding process as follows:

Rules about the support the LALC would receive for the process, and about how funding requests are to be made and how funding will be administered, have changed constantly.

Only a few months ago Lands have sought to change – via a “fact sheet” – the range of work they are prepared to support LALCs lawyers to perform.

The LALC has found this an overly bureaucratic and extremely frustrating process.

[The] LALC has requested early in the program that it be able to present to the Governance Committee when funding proposals were being considered. This opportunity was never granted.

331. The criteria for eligibility for payments also gave rise to ongoing concerns for LALCs.
332. The Departmental *ALA Funding Guidelines* published in 2018 stated:

It is acknowledged that most LALC members taking part in the negotiations are not paid LALC staff. Sitting fees are appropriate for

certain LALC panel members attending negotiation meetings. Compensation for non-paid LALC negotiation panel members i.e. negotiation panel members not paid by the LALC, will be at the rate of \$110 per half day and \$220 per full day in line with the Classification and Remuneration Framework for NSW Government Board and Committees.

333. This meant that some of the Aboriginal Elders attending meetings were being paid a minimal amount compared with the Government and Local Council staff with whom they were negotiating. This reinforced racial stereotypes of “inferior blackfellas”. One senior Aboriginal Elder stood down from the negotiations as he felt “really undervalued and [[it was]] really offensive”.
334. A further decision implemented, but not reflected in any related documents, was that if a LALC negotiator was also a State Government employee, then they were not eligible for any payment. This was despite the reality that the person had taken leave from their paid position to attend the negotiations in their unpaid community role and so were suffering a financial loss. The answer was that they should use their recreational leave as the Government would not pay twice. This represents a complete confusion about roles. The person was not present for any reason related to their paid employment which was with another NSW Government Department or agency. Their entitlement to recreational leave arose from their paid employment and should only have been used in that way. On the face of it, there was no valid reason that their paid employment with another NSW Department or agency presented any valid contention for refusing to pay them for attendances at negotiation meetings to fulfil their community obligations.
335. As discussed in Chapter 6, further analysis and assessment of the actual work required to progress new assessments to completion needs to be undertaken so a more realistic capacity building framework is developed.
336. The payment methods, the significant red tape to achieve any payments and the lengthy delays are not consistent with best practice or with the NSW Government’s commitments to paying small business in short, specified timeframes. These factors are not consistent with the payment routines of other NSW Government departments or agencies either, so it is not a Government-wide problem. In many agencies and departments, payments within less than seven days are frequently made.

5.30 Other agencies

337. Item 10 of the Ten Principles of ALA Negotiations was that “processes will be put in place to ensure relevant government agencies participate and share information with parties to negotiations where appropriate”.
338. One LALC participant interviewed as part of this Review stated:

The Department did not invite the participation of other agencies at any stage of the process.

The Department did not acquire information from other agencies until they were formally requested to do so by the other parties. This caused significant delays in the negotiations and increased the costs for consultants.

339. There were no formal mechanisms to involve other relevant departments and agencies on issues as they arose, either generally or related to particular geographical areas. This meant that there was no broader Government “buy in” to the program and no other interested personnel to assist with advice or information to push the negotiation process forward.
340. There are a range of obvious contenders where specific issues or areas could have been traversed to progress the negotiations, such as Aboriginal Affairs, the Office of Local Government, National Parks and Wildlife Service and the Forestry Corporation of NSW. Other agencies such as the Departments of Education or Health could have had an input into individual sites.
341. A wider view of the potential for a contribution from other arms of the NSW Government would assist in the progress of negotiations and create an environment of wider acceptability and accountability for the LNP.

5.31 LandsLink

342. One major component of the direct financial expenditure on the LNP process was the development of the LandsLink computer program which purported to be a computer program map of each of the geographical area under consideration in the four pilot program areas.
343. External users of LandsLink have many criticisms, including of its piecemeal release, inaccurate information, frequent crashes and unreliable access. Importantly, not all critical information was included on LandsLink and so other programs were needed to try and amalgamate the different data sets. The inaccurate information included incorrect title holders and wrong boundaries.
344. As one LALC interviewee explained:

so through LandsLink for example, they didn't make all the layers available all at one time. So they would then come out and put a new layer into the system and there are 1300 properties in this LALC alone to look at. So, we would then have to go back through every single property with the spreadsheets to go, 'Well, now that we know this new criteria, how we do feel about that? What's our negotiation position on that?' So, we would go back over all of those properties again and I have done that I don't know many times. Like, we are talking at least ten or fifteen times and when you are looking at 1300 properties, there's an awful lot of time and resources put into that.

345. Repeated requests for large format printed maps of the geographical areas under negotiation to ensure clarity and uniformity in the discussion were not

acted upon as being impractical and, inferentially, a waste of resources give the advantages of the computer generated maps.

346. One LALC interviewee observed:

The only information provided [[by the Department]]... was LandsLink which is difficult to use and only allows LALCs to look at parcels of land in isolation rather than as part of a landscape. This illustrates that the Department has little understanding of how Aboriginal culture looks at land and how it is used.

347. Another LALC CEO interviewed as part of this Review observed that “LandsLink is too complicated for the capacity of many LALCs”.

348. The negotiation spreadsheets prepared by the Department did not relate in an easily accessible way to LandsLink and required significant resources from the other parties to try and make sense of the two data sets in a way to underpin a profitable discussion forming a pathway forward.

349. It is noted that at this stage, LandsLink only covers the geographical areas in the pilot program and there is no similar computer map for the entire Crown Estate of NSW. This is somewhat surprising given the length of time that computer mapping has been available. It appears that there has been no review of LandsLink’s operations by a suitably qualified expert to assist in improving the technology as it will be required across NSW.

5.32 Poor communication

350. One repeated complaint from both Councils and LALCS has been the ongoing and repeated failure of the Department to answer emails or letters seeking further important information or clarification of documents. Routinely, these are not answered at all or the actual substance of the correspondence is ignored and some trivial response is provided.

351. Frequently, the information sought was integral to the further progress of the Council or LALCs preparation processes and the lack of any response meant that further resources had to be wasted preparing for an envisaged position.

352. As one LALC CEO wrote in November 2017:

There are concerns that timeframes are not being kept by the Department (such as communications regarding the outcomes of the recent capacity grant proposals). While there is continual pressure from the Department for the LALCs to meet timeframes that have been set by the Department, there does not appear to be the same standard set for the Department itself. Without timely responses to LALCs requests and to the information that LALCs are providing to the Department it is very difficult for LALCs to meet the overarching timeframes set by the Department.

353. This also adds a further disadvantage and inequality to the other two parties. While it may reflect poor resourcing within the Department, it appears more to be a matter of their own priorities and interests.
354. The Department also failed to respond within an appropriate timeframe, or indeed at all, to critical issues being raised by other NSW Departments or agencies, despite repeated attempts by the other agency. One agency sent important correspondence in June 2018, March 2019 and again in July 2019 and was finally offered a meeting to discuss the salient issues in September 2019.
355. This ongoing and repeated failure to respond to essential written communication is a further demonstration of a lack of good faith.
356. There is apparently no effective management system in place within the Department and no timelines for answering correspondence, which if not met must be explained to senior management.

5.33 Contaminated land

357. Some LALCs raised the issue of the NSW Government not being willing to assess the level and degree of contamination of land being considered for transfer and considerations that could arise if the contamination was not determined until after the transfer and the cost of remediation would be beyond the financial and other resources of the LALC which would thereafter hold title.
358. The proposed draft transfer agreements addressed the issue within a limited timeframe ending when the transfer was completed in the following way: if contamination was identified prior to transfer, the draft agreement proposed that an alternate land parcel “swap” could be undertaken.
359. There are some general principles and some specific Crown Lands issues which require consideration.
360. Section 5(1) of the *Contaminated Land Management Act 1997* (NSW) (**the ConLM Act**) defines contamination of land to mean “the presence in, on or under the land of a substance at a concentration above the concentration at which the substance is normally present in, on or under (respectively) land in the same locality, being a presence that presents a risk of harm to human health or any other aspect of the environment”.
361. Section 6(1) of the *ConLM Act* provides that a person is responsible for contamination of land if any of four conditions is met, including relevantly: (a) the person caused the contamination of the land; (b) the contamination occurred because an act or activity of the person resulted in the conversion of a substance that did not cause contamination of the land into a substance that did cause contamination of the land; and (c) the person is the owner or occupier of the land and the person knew or ought reasonably to have known that contamination of the land would occur and failed to take reasonable steps to prevent the contamination.

362. Section 6(6) of the *ConLM Act* provides that:

A person who is responsible for contamination continues to be responsible for that contamination under this Act whether or not the person has entered a contract or other arrangement that provides for some other person to be responsible for the contamination or for any harm caused by the contamination.

363. Depending on the land claimed, section 6(1)(a), (b) or (c) could impose responsibility on the NSW Government for any contamination occurring on the land prior to the transfer. If liability is thus attracted, the NSW Government would continue to be responsible after the transfer of the land by reason of section 6(6).

364. If the Environmental Protection Authority (**EPA**) has reason to believe that land is contaminated, and the contamination is “significant enough” to warrant regulation under the *ConLM Act*, the EPA has power under section 11 to declare the land to be significantly contaminated land. In assessing whether land is significantly contaminated, the EPA is to take into account considerations prescribed in section 12(1) of the *ConLM Act*. However, section 12(2) empowers the EPA to declare land to be significantly contaminated even if the possible harm could come into existence only in certain circumstances of occupation or use of the land and those circumstances do not exist at the time (provided the circumstances are reasonably foreseeable and consistent with the approved use of the land at that time).

365. If the EPA declares the land to be significantly contaminated, it has power under section 14(1) to issue “management orders” directing an “appropriate person” or public authority to carry out any action in relation to the management of the land that may be specified in the order and/or submit a plan of management of the land for the EPA’s approval. Section 14(6) provides significant monetary penalties for corporations and individuals who are served with a management order and fail to comply with any terms in the order.

366. Under section 16, management orders can require the person subject to the orders to, inter alia: investigate the existence, nature and extent of any significant contamination of the land; carry out remediation of the land; and monitor the effectiveness of any remediation or the risk of harm presented by the significant contamination of the land. “Remediation” is defined in section 4 of the *ConLM Act* to mean: preparing a long-term management plan (if any) for the land; and removing, dispersing, destroying, reducing, mitigating or containing the contamination of the land; and eliminating or reducing any hazard arising from the contamination of the land.

367. The NSW Government should recognise its potential liability and obligations under the *ConLM Act* and ensure that its proposed draft transfer agreements reflect that if Crown land is contaminated, then in addition to the option of the alternate land title swap, the NSW Government will undertake remediation works on the site before any transfer takes place.

368. The long term impact of contaminated land transferred to a LALC means that the cost of remediation could obliterate any potential economic benefit from the use and development of the land and so not be consistent with the objects of the *ALR Act*.

5.33.1 Relevant Departmental policies

369. The [then] Department of Industry – Lands & Water³⁵ had a Policy which provides for the way it will sell Crown land in accordance with the *Crown Land Management Act 2016*. The Policy provides that “Where land is contaminated or presents a hazard to the community, regard must be had to safety when considering the sale of Crown land in accordance with the *Contaminated Land Management Act 1997*”.

370. Annexure A to that Policy sets out assessment criteria to be considered in the sale of Crown land. One criterion is “Land that is contaminated” and Annexure A states that this is a consideration because: “Risk management issue. Effective property management is a key responsibility of NSW government. Considerations on whether to sell contaminated Crown land include but are not limited to responsibility for ongoing management and remediation of the site.”

371. Approval of a land claim under section 36 of the *ALR Act* leads to transfer of the land in fee simple, not sale of the land, so the Policy is not directly applicable. However, it demonstrates that the Department: (a) does include safety considerations relating to land that is contaminated or otherwise hazardous when disposing of Crown land under the *Crown Land Management Act 2016*; and (b) recognises that there may be circumstances in which the NSW Government has responsibility for ongoing management and remediation of the site, despite disposal of the Crown land through sale.

5.33.2 Clean-up notices

372. Under section 91(1) of the *Protection of the Environment Operations Act 1997* (NSW), the EPA may direct a person who is reasonably suspected by the EPA of causing or having caused a pollution incident to take such clean-up action as is specified in the notice and within the period specified in the notice. Section 91(5) provides significant monetary penalties for corporations and individuals who are served with a clean-up notice and fail to comply with any terms in the notice.

373. The advantage of a clean-up notice vis-à-vis a management order is there is no requirement that contamination be “significant contamination” before a clean-up notice can be issued. Pollution is defined in the Dictionary to the Act to mean: water pollution, air pollution, noise pollution or land pollution.

³⁵ Now Crown Lands, DPIE.

374. Reporting to the EPA, with the purpose of a clean-up notice being issued, could be an alternative option for land councils faced with the transfer of land that is contaminated.

5.34 Build errors

375. In the process of reviewing the maps on LandsLink for negotiations over individual parcels, there has been some identification of structures, including homes, outhouses and fences built on Crown land with no legal authority. This has been identified principally in rural areas.
376. The parcels in question and the structures have been “parked” even when other parties want to negotiate about those areas. There is no indication that the Department is further examining the issues or pursuing them by any discussion of potential legal responses to unlawful buildings and use of land. On some occasions, it was suggested by Departmental staff that as the situation had been in place for many years, there was no capacity for anything to be done now. This is patently incorrect and there should be an obligation to pass such information to the relevant Directorate within the Department for appropriate action to be instituted.

5.35 Sale of Crown Estate

377. One issue that arose was the process of the sale of parts of the Crown Estate which are subject to a Land Claim without any notice to the claimants or the local Aboriginal community. Even when the negotiators were advised that expressions of interest had been called over claimed areas or their sale was being actively pursued, they declined to take any steps to intervene with the actions of their Crown Lands’ colleagues.
378. Given the limited resources of LALCs, it is perhaps unsurprising that no injunctions have been sought from the Supreme Court on that point.
379. A modification of the internal processes of Crown Lands needs to be assessed to ensure that there are no sales or other forms of alienation of land interests where there are Land Claims, whether for the LNP LALCs or by other NSW LALCs or the NSWALC.

5.36 Overall perspective

380. Despite the manifest errors and omissions in the conduct of the LNP, all non-Crown Lands parties considered the LNP could now offer some positive outcomes moving forward, especially for LALCs, in ameliorating the many undetermined Land Claims due to the passage of time (over three years) and resources committed to date.
381. As one LALC interviewee to this Review said:

[The] LALC believes that the program is a good concept to avoid the need for the Aboriginal Land Claims (ALCs) to be made by LALCs and

the Minister to determine numerous ALCs on the basis of strict legal criteria.

The program ought to result in:

- [The] LALC receiving more Crown Land in compensation for historical injustice sooner and at less overall cost,
- The LALCs having greater awareness of the Crown land estate and Government land management principles and process; and
- The State having greater certainty sooner about the estate it has to hold and manage.

The program has offered opportunities for the LALC and its community to have a greater understanding and build capacity about Government processes, land management and the planning system.

In closing, this program has the potential to make a real difference in the lives of Aboriginal people, not only within [this] LALC area, but across the state. It is hoped that the program is continued once the obvious flaws in the program have been resolved.

382. Another LALC interviewee observed:

The Land Negotiation Process provided a great opportunity for LALC's to have Aboriginal Land Claims resolved and for small LALC's... to achieve ownership of land that can be developed socially, economically and culturally.

383. The Councils involved in the pilot have a similar positive response to the long-term benefits despite the resources and time expended to date for no actual outcome.

5.37 Conclusion

384. This Chapter has identified the main issues and strands which have arisen during the course of consultations and the documentary review. Recommendations which arise from the issues traversed are set out in Chapter 6.

6.

RECOMMENDATIONS

6.1 Overview

385. The various issues discussed in Chapter 5 demonstrate a sliding scale of importance for any ongoing program to clarify and realign the priorities and mode of operation of any land divestment program to be run by the NSW Government involving Local Councils and LALCs.
386. The recommendations from this Review are set out below.

6.2 Way forward

387. There are two major components for further consideration:
- a. the continuation, with amendments, of the LNP for the parties previously engaged in the pilot program (**Plan #1**), and
 - b. the voluntary participation of the remainder of Local Councils and LALCs in NSW in the amended program, howsoever titled, where individual parties agree to engage in the process (**Plan #2**).
388. Each of these components is discussed below, while acknowledging there is some overlap between the issues traversed under each sub-heading. There are a range of common themes that are pertinent from both Plans and these are discussed in Section C.

A. PLAN #1: FUTURE OF THE LNP

6.3 Next step for LNP

389. Consistent with the discussions in Chapter 5 and below:
- Recommendation #1:** That the current negotiations for the LNP involving seven Local Councils and seven LALCs continue, with the initial timeline of 30 June 2020 being the focus for the priority transfers identified by the parties to occur within two months of the re-commencement of each negotiation.
390. This recommendation reflects the concerns of the existing parties that they have committed significant time and resources since entering the pilot LNP in either 2016 or 2017 to develop a mechanism to meet the objectives then identified by the NSW Government. As the initiator and inviter, the NSW Government could suffer significant reputational loss in both local government

circles and local Aboriginal communities if the process was shut down or further delayed at this stage.

391. If used properly and with the right objectives, the developmental phases of the LNP to date can be applied across the State to the benefit of the pilot communities and the rest of the State. If the other recommendations are implemented both for the pilot areas and others, then a positive outcome from the whole program could be identified and obtained. A continuation of the LNP in its current state would not be justifiable given the many substantive and procedural flaws identified in this Report.
392. With all LALCs and the majority of Councils, there are parcels of land which have been negotiated and discussed. A number are ready to undergo the property transfer process and they are referred to as the “priority transfers” in Recommendation #1. This should continue. A smaller number are not as progressed and need some further attention, but not a substantial amount, to bring the negotiations to fruition by land transfers. These should also continue.
393. These should be able to be identified by Crown Lands and the other parties at the re-commencement of the negotiations for those particular parties.
394. The confidentiality restriction, discussed at Chapter 5.11, means that it is not possible to set out the details of the actual properties which are ready to proceed to transfer in this Report. However, this process should continue, and further resources should be committed as and when required for the priority transfers to be completed within the planned time and in the envisaged mode.
395. Crown Lands staff and other resources should be made available to bring this whole process to a positive and productive end result.
396. One Council withdrew from the lengthy negotiations and this was confirmed by a Council resolution in November 2019. However, there is no reason that the negotiation between Crown Lands and the relevant LALC cannot continue to fruition as the parcels of land under close consideration are not contingent on the involvement or consent of the Local Council. Having elected to exit the LNP, they cannot properly be permitted any role in determining the transfers between Crown Lands and LALCs.

B: PLAN #2: OTHER PARTS OF NSW

397. To ensure parity, and to obtain the optimum outcome given the time and resources expended by all parties in the pilot program:

Recommendation #2:

- a. That the principles and application of an LNP-type program be implemented across the remainder of NSW,
- b. the program does not need to be tri-partite at all times and negotiations between, for example, a LALC and Crown Lands can

be part of the overall program while progress is not linked to any other parts of the program being conducted in that LGA, and

- b. if any individual Local Council or LALC determines not to participate in the State-wide program, this does not exclude or have any detrimental impact on the other party participating in the program in the relevant Local Government Area.

398. This recommendation reflects the intrinsic value of an LNP-type program being conducted across NSW. The value arises in various fields. The State needs certainty as to its holdings and its exposure to Land Claims and Native Title claims. These can be addressed. Local Councils need certainty in the manner and form in which they can deal with land which they currently manage. This can also be achieved. The negotiation forum itself provides a valuable resource for all parties to openly discuss their claims and the potential for apparently competing interests to be resolved or addressed within that forum without unnecessary conflict. However, not all discussions need to be tri-partite and progress in between two parties does not need to be, and should not be, linked inextricably with progress with a different party. While developing and maintaining close working relationships between LALCs and Councils is an important by-product of an LNP-type program, it is not the essential ingredient as the land transfer process is the key indicator of a productive outcome.

399. Long term unresolved claims are not in the interests of the general community or more specifically of the local Aboriginal community. The objectives and purpose of the *ALR Act* need to be addressed in an effective way and this style of program can achieve that outcome. While there may be other avenues to achieve the same outcomes, the LNP processes, with the proposed alterations and increased resources, have a capacity to produce results. Its continued pursuit across NSW will lead to beneficial outcomes and have demonstrated value. Other approaches should be viewed as additional avenues and not as alternate ones. The longevity of all approaches in 2020 means that some definite results are needed for there to be ongoing confidence by the other parties that there is a commitment by Government to achieve realistic and demonstrable outcomes.

400. It is noted that some Local Councils have previously declined to participate in the LNP pilot program for reasons specific to the membership and interests of that particular Local Council. However, that approach does nothing to enable existing Land Claims to be addressed or resolved. As the Local Council is not a party to the Land Claim process except as a matter of courtesy, they have no legal basis to veto any negotiations between a LALC and the NSW Government. Consequently, those geographical areas covered by Local Councils refusing to participate in the proposed new program should not provide any basis in law or fact for the LALC to be excluded from the State-wide program.

401. Further,

Recommendation #3: Once the LNP transfers for the existing pilot participants are completed, the pilot parties should be able to join the ongoing State-wide program if they so decide.

402. Some of the parties to the LNP consider that the progress they have made is a substantial step in the ongoing potential for claims, including Land Claims, and want to spend time and resources developing the opportunities arising from the recent transfers. This can be viewed as a success of the pilot program. Therefore, they may elect not to further engage at this stage.
403. However, the NSW-wide program will obviously continue to run for some time. It will need to have a capacity for parties to join and re-join at different times as and when the necessity or convenience occurs. While there will need to be timeframes for the progress of individual negotiations, each one does not need to start on the same date as all others. Indeed, for administrative convenience, staggered commencement dates may be preferable.

C: COMMON ISSUES

404. There are a range of issues which will arise if Plan #1 and Plan #2 are implemented which are common to both Plans. To avoid repetition and confusion, they are discussed below.
405. Where timelines are proposed, they are based on an assumption that the appropriate Government decision-making processes have been undertaken and the further assumption that the recommendations of this Review are to be implemented. Without wishing to appear presumptuous, it is not possible to develop the necessary framework and plans without first adopting such assumptions.

6.4 Title of program

406. While there is a myriad of potential titles for the State-wide program, given the negative views of the LNP itself by participating parties, it is considered that continued use of that name would not project a forward-looking program.
407. For convenience, this Report adopts a fresh name – the Land Justice Program (**LJP**) - as an appropriate nomenclature for the State-wide program.
408. Therefore,

Recommendation #4: That the State-wide program be given an appropriate nomenclature, possibly the Land Justice Program.

6.5 Objectives

409. A clear delineation of the objective(s) of the LJP need to be adopted by Crown Lands, published, and adhered to as the program's underpinning principles at all stages.

410. Given the criticism and the obvious deficiencies in the Objectives in the ToR to this Review, it is not proposed that they be replicated as the objectives of the LJP or even form part of them.

411. Therefore,

Recommendation #5: That a set of Objectives which clearly set out the framework and established outcomes of the LJP be developed and implemented within one month of the program's commencement.

6.6 Development of templates

412. One waste of resources to date has been that each pilot area developed their own: (a) assessment and negotiation framework and (b) facilitation framework. The former involved staff and the use of consultants such as planners and lawyers. The latter involved the expertise and skills of each of the facilitators.

413. With the substantial experience now generated from inefficiencies in the LNP, it would be a fruitful exercise to develop templates for other LALCs and Local Councils to utilise for the next stages of the program. While any template will have inbuilt flexibility to meet individual circumstances, a symmetry in overall design and approach would be beneficial on resources and also on the range of expectations of the parties. Templates would have timeframes for different steps or stages as an integral part of their approach.

414. Therefore,

Recommendation #6:

a. Current senior staff and external planners and lawyers previously deeply involved in the LNP be invited to participate in an initial one day workshop, chaired by a suitably qualified expert, to develop a template for future negotiations and to establish principles with detailed content and timeframes. This process could be run as a half-day joint session and then the second half of the day split into separate professional groups of planners and lawyers to refine the content to meet the different considerations arising from the different professional focus. A second forum could be held if considered useful.

b. The facilitators of the pilots participate in a one day workshop, chaired by an experienced negotiator, to develop a template for future facilitators to: (i) build on the experience already gained through the negotiation processes; (ii) address any deficiencies or lacunae in the processes adopted to date; and (iii) to establish a method and approach.

415. Such an approach would save wasting considerable time and resources by starting from scratch each time when there are obvious commonalities across

the State which should be actively incorporated into any future negotiation sessions.

6.7 Model of negotiation

416. As a mechanism going forward for LNP participants and NSW generally, there needs to be an improved mode of negotiations to reflect transparency, accountability and equality between the parties. The proposals set out above are designed to achieve that outcome.
417. If the process is to continue to be co-operative and voluntary, then at least part of the process will continue to need the personal negotiation process. While time and resource intensive, this process can add benefit to outcomes reached by enabling all participants to engage in relevant discourse. Such exchanges are not available in a solely paper-based negotiation.
418. As not all land that could be available to transfer to LALCs is subject to existing Land Claims, it is critical to have full transparency and objectivity in the review of potential parcels for different parties.
419. A further important consideration is the forum for negotiations themselves. This model needs to be developed from the narrow and inaccurate interests-based negotiation model used to date to encompass and promote interests and rights for all parties and recognise the principles and rights expressly recognised in the *ALR Act*.
420. Therefore,

Recommendation #7:

- a. A framework for negotiations be developed and publicly-released by Crown Lands, based on the experiences to date and other necessary input.
- b. That framework reflect a mechanism that is readily accessible to all parties, has the capacity for information-exchange and transparency, and establishes set timeframes that are realistic, workable and maintained. All negotiations do not need to be tri-partite and should be developed within the most productive, practical and effective framework for the particular agenda in that particular geographical area.
- c. Access to a review through the Departmental Secretary be established as part of the framework for issues linked with claims by Crown Lands for blanket or wide exemptions for any State significant land or other umbrella claims to review all relevant considerations and make a binding determination.
- d. Where an established timeframe is not able to be met by one or more party/parties or where specific land is dropped or removed

from a claim, then a short paper should be prepared for all parties to consider and review the facts upon which the proposed change in timeframe or land relies. The purpose of this is to enable the other parties to have an understanding of the specifics of the situation and to request access to the Secretary's review mechanism if considered appropriate.

- e. An independent facilitator should have a clear role in making directions for the timetabling of work to be progressed between negotiation meetings, when the subsequent meetings should take place and the timing and who should attend subsequent meetings. Access to the Secretary's review mechanism could be utilised where Crown Lands fails or refuses to abide by the established timeframes or endeavours to alter the focus of a particular meeting.

421. The issue of confidentiality needs to be addressed within this framework. A flexible policy that enables LALCs and Local Councils to brief their management bodies and constituent bodies as and when required without divulging any contentious details such as individual parcels needs to be developed and agreed between the parties.

6.8 Identification of LALC priorities

422. One lesson from the pilot program that has been repeatedly demonstrated is that significant time and resources were expended in identifying the land parcels that could form the basis of the first and subsequent phases of the negotiations.

423. A refined and developed focus on land that is important to an individual LALC for reasons such as cultural significance or economic development could be adopted. A timeframe to expedite the first five identified parcels, and then the next five, and then the next ten, would provide a degree of certainty of focus and resources. This is important where land for economic benefit is identified as it would enable the LALC and the Local Council to work co-operatively and within realistic expectations of outcomes for new infrastructure and related developments.

424. This focus would encourage LALCs to develop a pragmatic approach to set their expectations within appropriate timeframes and with objectives such as economic development to be within the available parameters and developed within a co-operative framework in planning terms with the Local Council.

425. Land the subject of a Land Claim but not identified within a priority listing would not be considered to have lapsed. The review process to determine the 20 priority claims could identify some parcels that are accepted by the LALC as no longer claimable due to developments in use and purpose since the Land Claim was initially lodged. Those Claims could then be withdrawn as a separate process.

426. One important issue for LALCs is that the lengthy delay in resolving many Land Claims means that land which was claimed over 10, 15 or even more years ago may have changed in use. Critically, the surrounding area may have changed fundamentally, for example, from bush to suburban developments. This can have an impact on the ongoing nature and status of the Land Claim itself as well as the cultural, social or economic priority for the LALC.

427. Therefore:

Recommendation #8:

- a. That each LALC develop a list of their top priority claims, up to a maximum of 20, in a descending order of significance as determined by the claimant.
- b. This process to be completed within three months from the commencement date of the new and revised program of 1 July 2020.

428. The issue of resources is addressed below.

429. Resourcing or other limitations may result in an individual LALC being in the position of developing their first five top priority claims within a short period and then focus their attention and resources on achieving them. A list of 20 top priority claims is a broad objective which is designed to be flexible to meet the interests and expectations of individual LALCs. A list of a lower number should be treated with the same priority for achievement as a numerically longer list. A shorter list may better reflect the needs of a smaller LALC with more limited resources to properly develop and manage some new assets.

6.9 Review mechanism

430. While the exclusion of State significant land from the parameters of the LNP was a valid exclusion, the mode of blanket exclusions is not justifiable and ignores the rights created pursuant to a proper implementation of the *ALR Act*.

431. This is a major issue to be addressed both for the current LNP negotiations and also for the State-wide LJP program to be effectively implemented.

432. One major flaw of the Department making all decisions with no avenue for review or any mechanism for the other parties to engage in fruitful negotiations about particular parcels of land has resulted in the Department having ultimate decision-making authority over their own views and decisions. This denies the whole process even a veneer of procedural fairness and of transparent and open Government decision-making.

433. Therefore, while confirming the necessity for an exemption for State significant land and the current seven criteria for assessing land within the Crown Estate, Recommendation #9 is in the following terms:

Recommendation #9:

- a. That blanket exemptions for all land determined as State significant land not be applied in any negotiations involving land transfers from the Crown Estate, for the pilot negotiations and ongoing programs.
 - b. All parcels be assessed on their individual merit and not with the application of broad and potentially invalid assumptions about use, access and legal avenues to address these issues.
 - c. The Secretary of the Department be appointed to perform the role of an overseer or reviewer of the LNP and the new program and in particular the application of the State significant land criteria, with advice as and when required from a specialised taskforce with external advice from other Government agencies if necessary for individual sites.
 - d. A Terms of Reference be developed for the overseeing or review role of the Secretary and the role and function of the specialised taskforce, with criteria for the seeking of external advice set out, including clarity around the objectives and functions of that role and when the role may be initiated and pursued.
 - e. The Terms of Reference include any other issues of conflict or potential conflict between the different parties to ensure that no unnecessary or invalid blocks to future negotiations are created and not able to be properly addressed.
 - f. This review mechanism should only be used as a “last resort” option when the negotiations have reached an impasse but could provide valuable guidance in developing approaches to broader issues that could arise across NSW and not just in one local area and such guidance would be an efficient way of addressing such issues, through the issue of notes to assist all parties.
 - e. The Terms of Reference to be published on the Department’s website in the package of material on the LNP and the new program, along with the objectives and the other relevant information.
434. The Secretary is the most senior manager of the Department and so has ultimate responsibility for the programs and the conduct and management of staff and has an oversight role into the conduct and progress of the whole program across all of NSW. The Secretary could properly perform the review process for claims of State significant land and provide an avenue for other parties to raise the substance of their claims for the same parcels in an independent assessment and determination. The assistance of a specialised taskforce would enable the Secretary to draw on expertise relevant to the issues of that particular review. The parties would need to agree that this review

mechanism would then finally determine the matter, subject to any further requests or requirements of that reviewer.

435. This would cover all areas such as coastal lands, Travelling Stock Routes, racecourses and showgrounds and services stations. Other extensive exclusions currently applied to leaseholds, commons and Scout halls would also be covered by the review mechanism.
436. Other important issues that needed some review for resolution could also be included in the Terms of Reference. For example, one issue that could benefit from a senior management overview is the generic transfer agreement which Crown Lands intends to impose on the other parties for each land transfer. The agreement has not been examined in detail as part of this Review, but it is a detailed, lengthy and complex document and the necessity for such complexity and details needs to be reviewed to ensure it is actually required to meet the legal needs and demands of the transfer in question.

6.10 The “Cap”

437. As discussed in Chapter 5, the late and uneven release of information concerning the limitation on the value of land that could be transferred from the Crown Estate to the other two parties developed into a contentious and problematic bar to most future transfers.
438. This fiscal and time limitations on land transfers and the valuation process where no actual funds change hands needs to be re-evaluated. This process is beyond the ambit of this Review. However, given the detriment the Cap has had and could have to the future process and completion of some negotiations, it is not an issue that can now be sidestepped or ignored.
439. The fundamental basis for the assertions of a cap and the economic and other bases of these assertions needs to be clearly delineated in a discussion paper that can be available to all current parties, potential parties and the broader, interested communities.
440. As noted above, there is no statutory power under the *ALR Act* for the State to refuse a land transfer because of the application of any cap on land value. This means that some LALCs may decide not to participate in any voluntary program as it will incorporate barriers or penalties that they are not otherwise subject to when pursuing Land Claims under section 36 of the *ALR Act*.
441. In order to provide clarity and transparency to the process, Recommendation #10 is in the following terms:

Recommendation #10: The Secretary of the Department and the Secretary of NSW Treasury determine a mechanism to review the current processes for assessing and determining the quantum and timing of land transfers. The purpose of this mechanism is to determine whether the current factors unilaterally imposed present a valid approach and whether there are any other way or ways that can facilitate

land transfers without detriment to the financial status and standing of the State.

442. It is noted that the percentage of land envisaged to be transferred, even on the most optimistic view, compared with the overall land holdings in NSW are minimal. Further, the impact of proposed transfers needs to be realistically assessed and not be the subject of generalised assertions as to a negative outcome that cannot withstand informed and objective scrutiny.

6.11 Bureaucratic arrangements

443. It is obviously necessary for the Department to maintain the main bureaucratic arrangements for the effective implementation of the programs. One of the flaws in the operation of the LNP to date has been its silo existence and the lack of formal structures for communication, feedback and exchanges with the Aboriginal Land Claims branch of Crown Lands. That segment of Crown Lands has staff who are highly experienced in negotiating Land Claims and know many of the LALCs and their status and progress with Land Claims. Their total exclusion to date has denied the LNP access and use of valuable expertise and experience. Obviously, this lacuna needs to be cured immediately.
444. One important structural issue is whether the two segments of Local Councils and LALCs should be kept together or bifurcated.
445. There are distinct advantages for the two parties working together co-operatively to develop better relationships and to have clear and accurate information on their different, and potentially over-lapping, interests in their local environment. This can be achieved through joint planning meetings and the exchange of information. This does not create any obvious reason for the two parties to be in the same management unit.
446. Therefore, Recommendation #11 is in the following terms:

Recommendation #11:

- a. The LNP teams within Crown Lands be abolished by 30 June 2020 or earlier once the current priority land transfer process is completed or the functions are transferred elsewhere.
- b. Two new teams be created within the same management structure so they share the same Executive Director and Director.
- c. One team is to manage the negotiations and the content of the negotiations for Local Councils.
- d. One team is to manage the negotiations and the content of the negotiations for LALCs and this unit should be established within the structure of the Aboriginal Land Claims branch.

447. Each unit should have a senior manager, and suitably qualified and experienced staff, to form negotiating teams with the necessary administrative support.

6.12 Governance Committee

448. The existing Governance Committee has had a limited role despite the valuable contribution that could have been made by its members.

449. In developing a State-wide approach and recognising the increase in the number of negotiations and available resources that should be occurring during the next three years, the former role of the Governance Committee has become unnecessary.

450. A general overview role for an external committee could perform the task if the necessity was demonstrated. The mechanism set out above with the Secretary's review mechanism could perform an oversight function. If after 6 or 12 months' operation of the LJP, there needs to be some further or different review mechanism to enable a timely process to continue, the role of a revised Governance Committee may become necessary and this issue could be revisited.

451. One drawback of the closed approach of the Department has been the denial of any input from Aboriginal Affairs, despite their knowledge and expertise and community connections. A better mechanism for their input at a bureaucratic level needs to be developed within the template process so that they can contribute to State-wide and specific geographical areas as and when required.

452. The NSWALC will continue to have a role due to its statutory functions and its involvement with LALCs and therefore would not be denied any real access or utility if the Governance Committee as it has functioned was not to continue.

6.12 Resources for non-Government parties

453. One lesson from the LNP pilot program is that an orderly and productive progress of negotiations requires resourcing at levels and with certain skills that smaller Councils and LALCs do not have internally.

454. The quantity of those requisite resources will vary but will fall within several defined categories. These include: (a) mapping of the local area; (b) planning; and (c) legal advice. Legal advice may be required in the early stages where existing Land Claims are involved or in the later stages of negotiations where the content and form of transfer agreements are being traversed.

455. One approach could be to establish an independent standalone unit that provides resources to LALCs and Local Councils as and when required. This would enable a degree of specialisation to occur by the recruitment of suitable lawyers and planners who could then further develop specialist expertise about the negotiation process and procedures. This would reduce double handling and double learning by the appropriate professionals.

456. This unit should not be placed within the ambit of NSWALC for two reasons. The first is that it would be delivering services to Local Councils as and when required and hence would fall outside the Objects and Functions of NSWALC set out in sections 105 and 106 of the *ALR Act*.
457. Secondly, NSWALC performs an important statutory role in relation to Land Claims, specifically for land dealings and approvals pursuant to sections 42D and 42E of the *ALR Act* and other powers in Division 4, Part 2 of the *ALR Act*. To also administer a unit responsible for providing the professional backup services to develop and then finalise claims would present a clear conflict of interest which could not properly be cured by management “walls” as all relevant management decisions have to be made by the Chief Executive Officer. Some of those are statutory decisions pursuant to the *ALR Act*, such as section 41 certificates.
458. Therefore, Recommendation #12 is in the following terms:

Recommendation #12:

- a. That the NSW Government, through a suitable agency, fund an independent, standalone unit set up outside the formal structures of Government, to provide detailed advice and assistance to LALCs and Local Councils to engage with and productively participate in the proposed LJP and State-wide programs.
- b. The staff consist mainly of planners and lawyers with access to mapping expertise and administrative support functions also covered, comprising a unit of approximately 12-15 people with an anticipated lifespan of 4 to 6 years.
- c. The initial focus of work would be to assist LALCs and Local Councils to develop a framework of up to 20 top priorities in a sliding scale reflecting the cultural, social and economic requirements of that local area.
- d. If appropriate, one or two independent facilitators could be included within the staffing of the unit to increase the efficiency and effectiveness of the negotiation process, rather than using different individuals for each geographical area.

6.13 Other issues

459. There are some issues traversed in Chapter 5 that are outside the ToR of this Review and so are not subject to recommendations. However, they are important issues which need further consideration at least at a senior management level with some resources and focus required to be devoted to the resolution of each one.
460. These issues include:

- a. The need to development a State framework to properly address Native Title Claims so that there is a cogent and coherent policy approach in NSW which permits matters to proceed to finalisation in a timely manner.
 - b. The slow and cumbersome payment methods of the Department need to be reviewed and brought into line with the usual processes of the NSW Government and to ensure Government policies such as timely payments to small businesses are met.
 - c. The process for rectification, including notice to owners or lessors where errors are identified in the buildings or other infrastructure constructed on Crown land in an unauthorised manner, to commence and then conclude rectification in a timely manner, regardless of the length of time the misalignment has occurred or the identity of the current occupant of the property wrongly constructed on Crown land.
 - d. The poor practices within the Department of not responding at all or in a timely fashion to correspondence that raise serious issues, whether by pilot participants or other persons or organisations, need to be resolved with a correspondence policy with strict timeframes that must be adhered to and a suitable system to monitor compliance as there is significant reputational loss to Ministers and the NSW Government that flows from the current poor practices of some parts of the Department.
 - f. The need to develop a policy in relation to alienation of land interest, such as through sale or long term lease, over land that is the subject of a Land Claim and ensure implementation across the Department and across Government.
461. There are other issues arising from or related solely or significantly to the LNP but which cannot be taken any further within the context of this Review and in light of the conclusions reached and comments made in Chapter 5. These include:
- a. The issue of GST no longer seems to give rise to any reason for the delay in progressing transfers of title.
 - b. The demand that all Land Claims in a particular LGA be abandoned and no future claims be made for that area as part of the “bargain” for other, small parcels to be transferred to a LALC is not a reasonable requirement when no similar requirement is made of Local Councils and which is not a balanced approach to LNP negotiations over individual parcels and not the entire LGA.
 - c. The further development of LandsLink involving some appropriate and independent IT review processes is required to make the system more accessible, more readily understood by consumers, less prone to crashes and an accurate representation of title holders, with capacity to correct in a timely manner when it is shown details are incorrect.

462. Another issue which has arisen, especially in regional areas, is the link between funded programs and Aboriginal employment targets. An important plank to the long-term economic future of Aboriginal communities is sustainable employment for community members. Aboriginal enterprises can provide some employment options. However, other employers such as local councils and the State Government can provide critical employment programs, starting with targeted apprenticeships and traineeships, to provide real employment opportunities for the local Aboriginal community. Where Government resources are being fed into communities and related organisations, then employment targets can (and should) be included as a fundamental principle for the program. Opportunities for proper training into jobs offer a lifetime of employment for the individual, with economic benefits flowing to the individual, their family and to their whole community which increases sustainability of that community.

6.14 Other approaches

463. As this Review was limited to the operation of the Land Negotiation Program itself, it was beyond its ambit to review other mechanisms or policy approaches that could be implemented to reduce the quantum of unresolved Land Claims under the *ALR Act*.

464. However, it should not be accepted that the LNP is the only way forward. There are other creative and interesting mechanisms with the potential to assist with important issues such as economic development in some towns or maintaining and developing cultural tourism and related projects, which can also address unresolved Land Claims.

465. The use of State Environmental Planning Policies (**SEPP**) is just one mechanism for LALCs and the NSW Government to work co-operatively for land development projects in particular areas.

6.15 Conclusion

466. As has been said:

*The measure of success is not whether you have a tough problem to deal with, but whether it is the same problem you had last year.*³⁶

467. The long-standing nature of the issues being dealt with in the LNP show that there needs to be urgent and focussed attention to resolution, with sufficient commitment, resources and goodwill from all parties to achieve a sound and solid outcome in a timely manner. To fail to do so is to fail all the people of NSW.

³⁶ John Foster Dulles, Former US Secretary of State.

**A REVIEW OF THE
LAND NEGOTIATION PROGRAM:**

ANNEXURES

**A REVIEW OF THE
LAND NEGOTIATION PROGRAM:**

ANNEXURE A:

**TERMS OF
REFERENCE
OF REVIEW**

TERMS OF REFERENCE

Review of the Land Negotiation Program

Governing Authority

Minister for Water, Property & Housing (“the Minister”)

Agency

Department of Planning, Industry and Environment (“DPIE”), Land & Housing Division, Crown Lands (“The Department”)

Purpose

To undertake a review of the Land Negotiation Program (LNP).

Key context

The LNP facilitates voluntary negotiations over land in the Crown estate between the NSW Government, the NSW Aboriginal Land Council (NSWALC), Local Aboriginal Land Councils (LALCs) and Local Councils. Land that meets specified criteria may be transferred for local ownership to Councils. Other land may be transferred to LALCs.

Concerns have been raised in relation to the design of the LNP.

The objectives of the LNP

These include:

1. Retention of certain Crown land for the benefit of all the people of NSW
2. Transfer of appropriate land to Local Councils and LALCs
3. Deliver improved economic, social and cultural opportunities for Aboriginal people
4. Improved certainty in dealing with Crown land

Scope

1. To review and report on the effectiveness of the LNP by reference to:
 - a) the original objectives and design of the LNP;
 - b) the progress of the LNP; and
 - c) the Reviewer’s discussions with program partners (NSWALC and Office of Local Government) and key stakeholders including, LALCs, Crown Land Commissioner, Local Government Councils and relevant NSW Government agencies.
2. Arising from 1 above, make recommendations to the Ministers in relation to:
 - a) the vesting of land to Local Government Councils under s. 4.6 of the *Crown Land Management Act 2016*;
 - b) the use of Aboriginal Land Agreements under s. 36AA of the *Aboriginal Land Rights Act 1983* to transfer land to LALCs; and
 - c) enhancements to the Agency’s approach to addressing Aboriginal land claims under the *Aboriginal Land Rights Act 1983* (NSW).

Timeframe

Public consultation will occur in November – December 2019 with a final report due on 2 March 2019.

**A REVIEW OF THE
LAND NEGOTIATION PROGRAM:**

ANNEXURE B:

***ALR ACT*
LITIGATION**

ANNEXURE B

ALR ACT LITIGATION

- B1. As discussed in Chapter 3.5, paragraphs 69 to 78, there has been some litigation in the NSW Court of Appeal and the NSW Supreme Court involving the *ALR Act*. Set out below is an overview of the Court of Appeal decisions.
- B2. In *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council*^{B1}, the Minister commenced the appeal and was unsuccessful. The Minister argued that the requirement in section 36(5) that he or she form a state of satisfaction as to whether the claimed land is claimable Crown lands before granting or refusing the claim was discharged in 2009 (when the land claim in question was made) by an earlier opinion formed in 2004 (when an unrelated land claim was made and refused in relation to a portion of the claimed land). The NSW Court of Appeal held that the primary judge was entitled to consider whether there had been changes in the circumstances affecting the claimed land between 2004 and 2009 as the Minister's case had been that the opinion in 2004 remained operative and determinative because no relevant change had occurred in the circumstances affecting the land over that period.
- B3. In *New South Wales Aboriginal Land Council v Minister Administering Crown Lands Act*^{B2}, the NSWALC commenced the appeal and was unsuccessful. The NSWALC argued that the claimed land, which was the site of a decommissioned gaol, was claimable Crown lands. The Minister had rejected the NSWALC's claim, pursuant to section 36(5)(b), on the basis that the land was lawfully used and occupied by Corrective Services NSW (**CSNSW**). The Court held that the primary judge was correct in her approach to assessing whether there was occupation in fact, by considering all the acts taking place on the land in their totality. The findings of fact, including the presence of security 24 hours a day 7 days a week and regular visits by offenders serving Community Services Orders to perform work in the grounds and gardens under the supervision of a CSNSW officer, were sufficient to sustain a finding of occupation in fact. This matter was appealed by the NSWALC to the High Court of Australia (discussed above), where the NSWALC was again unsuccessful.
- B4. In *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act*^{B3}, the NSWALC commenced the appeal and was successful. The NSW Court of Appeal held that the Minister must personally form the necessary opinion under s 31(1)(b1) to preclude an otherwise successful land claim. The nature and beneficial purpose of the statutory scheme under the *ALR Act*, the subject matter of the opinion that needs to be formed and the

^{B1} [2016] NSWCA 253.

^{B2} [2015] NSWCA 349, (2015) 215 LGERA 103.

^{B3} *The Nelson Bay Claim*, [2014] NSWCA 377, (2014) 88 NSWLR 125.

absence of an express power to delegate weigh in favour of such a construction.

- B5. In *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council*^{B4}, the Minister commenced the appeal and was successful. The NSWALC had made two land claims which were refused by the Minister on the basis that the lands claimed were “lawfully used or occupied” within the meaning of section 36(1) at the date of claim. A Licence had been granted over the first parcel of land and a Permissive Occupancy had been granted over the second parcel of land. The Licence and Permissive Occupancy each specified the use of the land to be for “grazing”. The relevant parts of each parcel of land had been reserved from sale for “future public requirements”. The NSW Court of Appeal held that the Licence and Permissive Occupation did amount to lawful use or occupation because the reserved purpose was “public requirements” relating to the future, and it could be inferred that the relevant Ministers intended and believed that granting the instruments would maintain the land to facilitate its use in the future for “public requirements”. The NSWALC failed to discharge its practical burden of identifying a sensible competing inference that could be drawn.
- B6. In *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council*^{B5}, the Minister commenced the appeal and was unsuccessful. Again, the claimed land had been reserved from sale, but in this case for the purpose of “public recreation”. A grazing licence was then granted by the Minister over the land. The Minister refused the land claim on the basis that by reason of the licence, the land was “lawfully used or occupied” within the meaning of section 36(1). The NSW Court of Appeal held the Minister cannot exercise a power which is inconsistent with the terms of a reservation, therefore the grazing licence had not been validly granted and did not amount to “lawful use or occupation”.
- B7. In *Minister Administering the Crown Lands Act v La Perouse Local Aboriginal Land Council*^{B6}, the Minister commenced the appeal and was unsuccessful. The NSW Court of Appeal held that the primary judge had made no error in rejecting the Minister’s evidence as not demonstrating the continuing use or occupation of the land as a command post and that transitory physical activities on land do not necessarily amount to use or occupation. The Court confirmed that there is an evaluative process to be undertaken in respect of the facts of each case and it is a function of the trial court to undertake that function.
- B8. In *Minister Administering the Crown Lands Act v Illawarra Local Aboriginal Land Council*^{B7}, the Minister commenced the appeal and was unsuccessful. The Minister failed to establish that the decision of the primary judge was affected by any error of law.

^{B4} [2014] NSWCA 69.

^{B5} *The Goomallee Claim*, [2012] NSWCA 358, (2012) 84 NSWLR 219.

^{B6} [2012] NSWCA 359, (2012) 193 LGERA 276.

^{B7} [2011] NSWCA 127, (2011) 182 LGERA 133.

- B9. In *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council*^{B8}, the Minister commenced the appeal and the appeal was allowed in part. The NSW Court of Appeal agreed that the primary judge had erred in law by finding that conclusive certificates issued by the Minister under section 36(8) of the *ALR Act* were void under administrative law principles.
- B10. In *Minister Administering the Crown Lands Act v Illawarra Local Aboriginal Land Council*^{B9}, the Minister commenced the appeal and was successful. The NSW Court of Appeal held that the primary judge erred in law because he did not address the correct question, namely whether the land was, as a matter of fact, likely to be needed by the Executive Government for an essential purpose. Rather, his Honour addressed a question distorted by an irrelevant consideration of whether any trajectory towards the existence of such need was itself at the appropriate government level.
- B11. In *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council*^{B10}, the Minister commenced the appeal and was unsuccessful. The Minister failed to establish that the decision of the primary judge was affected by any error of law.
- B12. In *Minister Administering the Crown Lands Act v Bathurst Local Aboriginal Land Council*^{B11}, the Minister commenced the appeal and was unsuccessful. The Minister failed to establish that the decision of the primary judge was affected by any error of law, but rather attacked her Honour's factual findings in respect of the characterisation of the activities being carried out on the claimed land.
- B13. In *NSW Aboriginal Land Council v Minister Administering The Crown Lands Act*^{B12}, the NSWALC commenced the appeal and was successful. The NSW Court of Appeal held that there was an error of law in the primary judge's decision, being an error of mixed law and fact, in the finding that the decision to sell the claimed land and the steps taken in furtherance of that intention, considered collectively, amounted to a use of the land. Contrary to the conclusion at first instance, the Court said that there is no support in case law for that proposition nor is there support in case law for the proposition that 'use' includes a right to use the land which arises without any dealing necessarily taking place. The Minister appealed this decision to the High Court of Australia (see below) and was again unsuccessful.
- B14. In *Mogo Local Aboriginal Land Council v Eurobodalla Shire Council*^{B13}, the land council commenced the appeal and was unsuccessful. The NSW Court of Appeal held the claimed land was not claimable Crown land because the local council had an estate in fee simple over the land which gave it full rights of ownership.

^{B8} [2009] NSWCA 352, (2009) 171 LGERA 56.

^{B9} [2009] NSWCA 289, (2009) 168 LGERA 71.

^{B10} [2009] NSWCA 151.

^{B11} [2009] NSWCA 138, (2009) 166 LGERA 379.

^{B12} [2007] NSWCA 281, (2007) 157 LGERA 18.

^{B13} [2002] NSWCA 12, (2002) 54 NSWLR 15.

- B15. In *Minister Administering the Crown Lands ACT v Deerubbin Local Aboriginal Land Council (No 2)*^{B14}, the Minister commenced the appeal and was unsuccessful. The Minister had refused the claims on the basis that the land was “needed or likely to be needed” for the “essential public purpose” of the creation of a national park and was therefore not claimable Crown Lands by virtue of section 36(1)(c) of the *ALR Act*. The NSW Court of Appeal held that the word “likely” always takes its colour from its surroundings. In this context, “likely” means “a real or not remote chance”. The primary judge applied that test. No error of law was revealed in his Honour’s judgment.
- B16. In *Minister Administering the Crown Lands Act v Deerubbin Local Aboriginal Land Council*^{B15}, the Minister commenced the appeal and was successful. The NSW Court of Appeal held that for the purposes of section 36(1)(c) of the *ALR Act*, the question is whether the land was, at the date of the claim, “needed” in the sense of “required” or “wanted”, or likely to be needed for an essential public purpose. It is not relevant to inquire into whether the purpose can somehow otherwise be achieved, and the primary judge erred by taking this into account.
- B17. In *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council (No 2)*^{B16}, the Minister commenced the appeal and was successful. The NSW Court of Appeal held that for the purposes of section 36(1)(b) of the *ALR Act*, “lawfully” must qualify both “used” and “occupied”. “Lawfully” may include either or both of two different meanings. It may mean used for lawful purposes or occupied for lawful purposes. It may, in addition or alternatively, mean used by a person who has the right to occupy the land.
- B18. In *Gandangara Local Aboriginal Land Council v Minister Administering the Crown Lands Act*^{B17}, the LALC commenced the appeal and was unsuccessful. The NSW Court of Appeal held that the claimed land was not claimable Crown land within the meaning of the applicable statutory regime, being the *Crown Lands Consolidation Act 1913* (NSW).
- B19. In *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council*^{B18}, the Minister commenced the appeal and was successful. The Minister argued that the part of the land was not “claimable Crown lands” for the additional reason that it was land lawfully used or occupied by the holder of a mining lease and that the claim was premature in that cl 8, Schedule 4 of the *ALR Act* postponed the status or quality of the land being claimable Crown lands until the mining lease ceased to be in force. The NSW Court of Appeal accepted this argument.
- B20. In *Daruk Local Aboriginal Land Council v Minister Administering the Crown Lands Act*^{B19}, the LALC commenced the appeal and was successful. The NSW Court of Appeal held that the words “used” and “occupied” in section 36(1)(b)

^{B14} [2001] NSWCA 28, (2001) 50 NSWLR 665.

^{B15} (1998) 43 NSWLR 249.

^{B16} (1997) 42 NSWLR 641.

^{B17} (1997) 41 NSWLR 459.

^{B18} (1993) 31 NSWLR 106, (1993) 80 LGERA 173.

^{B19} (1993) 30 NSWLR 140, (1993) 79 LGERA 341.

of the *ALR Act* mean actually used and actually occupied in the sense of being used in fact, and occupied in fact, and to more than a merely notional degree.

- B21. In *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act*^{B20}, the NSWALC commenced the appeal and was successful. The NSW Court of Appeal held that the relevant date for determining whether land is "claimable Crown land" is the date that the claim is lodged.
- B22. In *Minister for Natural Resources v NSW Aboriginal Land Council*^{B21}, the Minister commenced the appeal and was successful. The NSW Court of Appeal held the land was not claimable land within the meaning of section 36(5) of the *ALR Act* as it was "occupied" pursuant to the permissive occupancy (which allowed by retrospective and prospective operation of the enabling legislation).

CASES BY COMMENCING PARTY

Cases commenced by the Minister	Cases commenced by a LALC
<i>Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council</i> [2016] NSWCA 253	<i>New South Wales Aboriginal Land Council v Minister Administering Crown Lands Act</i> (2015) [2015] NSWCA 349; 215 LGERA 103
In <i>Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council</i> [2014] NSWCA 69	<i>New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (the Nelson Bay Claim)</i> [2014] NSWCA 377; (2014) 88 NSWLR 125
<i>Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council (Goomallee Claim)</i> [2012] NSWCA 358; (2012) 84 NSWLR 219	<i>NSW Aboriginal Land Council v Minister Administering The Crown Lands Act</i> [2007] NSWCA 281; (2007) 157 LGERA 18
<i>Minister Administering the Crown Lands Act v La Perouse Local Aboriginal Land Council</i> (2012) 193 LGERA 276; [2012] NSWCA 359	<i>Mogo Local Aboriginal Land Council v Eurobodalla Shire Council</i> [2002] NSWCA 12; (2002) 54 NSWLR 15
<i>Minister Administering the Crown Lands Act v Illawarra Local Aboriginal Land Council</i> [2011] NSWCA 127; (2011) 182 LGERA 133	<i>Gandangara Local Aboriginal Land Council v Minister Administering the Crown Lands Act</i> (1997) 41 NSWLR 459
<i>Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council</i> [2009] NSWCA 352; (2009) 171 LGERA 56,	<i>Daruk Local Aboriginal Land Council v Minister Administering the Crown Lands Act</i> (1993) 30 NSWLR 140; (1993) 79 LGERA 341
<i>Minister Administering the Crown Lands Act v Illawarra Local Aboriginal Land Council</i> [2009] NSWCA 289; (2009) 168 LGERA 71	<i>New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (The Winbar Claim No 3)</i> (1988) 14 NSWLR 685; (1988) 66 LGRA 265

^{B20} *The Winbar Claim No 3*, (1988) 14 NSWLR 685, (1988) 66 LGRA 265.

^{B21} (1987) 9 NSWLR 154, (1987) 62 LGRA 409.

<i>Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council</i> [2009] NSWCA 151	
<i>Minister Administering the Crown Lands ACT v Deerubbin Local Aboriginal Land Council (No 2)</i> [2001] NSWCA 28; (2001) 50 NSWLR 665	
<i>Minister Administering the Crown Lands Act v Deerubbin Local Aboriginal Land Council</i> (1998) 43 NSWLR 249	
<i>Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council (No 2)</i> (1997) 42 NSWLR 641	
<i>Minister Administering the Crown Lands Act v NSW Aboriginal Land Council</i> (1993) 80 LGERA 173; (1993) 31 NSWLR 106	
<i>Minister for Natural Resources v NSW Aboriginal Land Council</i> (1987) 9 NSWLR 154; (1987) 62 LGRA 409	

CASES BY SUCCESSFUL PARTY

Cases in which the Minister was successful	Cases in which the LALC was successful
<i>New South Wales Aboriginal Land Council v Minister Administering Crown Lands Act</i> (2015) [2015] NSWCA 349; 215 LGERA 103	<i>Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council</i> [2016] NSWCA 253
<i>In Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council</i> [2014] NSWCA 69	<i>New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (the Nelson Bay Claim)</i> [2014] NSWCA 377; (2014) 88 NSWLR 125
<i>Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council</i> [2009] NSWCA 352; (2009) 171 LGERA 56	<i>Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council (Goomallee Claim)</i> [2012] NSWCA 358; (2012) 84 NSWLR 219
<i>Minister Administering the Crown Lands Act v Illawarra Local Aboriginal Land Council</i> [2009] NSWCA 289; (2009) 168 LGERA 71	<i>Minister Administering the Crown Lands Act v La Perouse Local Aboriginal Land Council</i> (2012) 193 LGERA 276; [2012] NSWCA 359
<i>Mogo Local Aboriginal Land Council v Eurobodalla Shire Council</i> [2002] NSWCA 12; (2002) 54 NSWLR 15	<i>Minister Administering the Crown Lands Act v Illawarra Local Aboriginal Land Council</i> [2011] NSWCA 127; (2011) 182 LGERA 133
<i>Minister Administering the Crown Lands Act v Deerubbin Local Aboriginal Land Council</i> (1998) 43 NSWLR 249	<i>Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council</i> [2009] NSWCA 151
<i>Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council (No 2)</i> (1997) 42 NSWLR 641	<i>Minister Administering the Crown Lands Act v Bathurst Local Aboriginal Land Council</i> [2009] NSWCA 138

<i>Gandangara Local Aboriginal Land Council v Minister Administering the Crown Lands Act</i> (1997) 41 NSWLR 459	<i>NSW Aboriginal Land Council v Minister Administering The Crown Lands Act</i> [2007] NSWCA 281; (2007) 157 LGERA 18
<i>Minister Administering the Crown Lands Act v NSW Aboriginal Land Council</i> (1993) 80 LGERA 173; (1993) 31 NSWLR 106	<i>Minister Administering the Crown Lands ACT v Deerubbin Local Aboriginal Land Council (No 2)</i> [2001] NSWCA 28; (2001) 50 NSWLR 665
<i>Minister for Natural Resources v NSW Aboriginal Land Council</i> (1987) 9 NSWLR 154; (1987) 62 LGRA 409	<i>Daruk Local Aboriginal Land Council v Minister Administering the Crown Lands Act</i> (1993) 30 NSWLR 140; (1993) 79 LGERA 341
	<i>New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (The Winbar Claim No 3)</i> (1988) 14 NSWLR 685; (1988) 66 LGRA 265

**A REVIEW OF THE
LAND NEGOTIATION PROGRAM:**

ANNEXURE C:

**COMMENTARY BY
AUDITOR-GENERAL
ON LAND CLAIMS**

ANNEXURE C

COMMENTARY BY AUDITOR-GENERAL ON LAND CLAIMS

- C1. As discussed at Chapter 3.7, paragraphs 87 and 88, the NSW Auditor-General has made a number of recommendations and informed commentary on the Land Claims processes and identified a range of important administrative issues in relation to the *ALR Act* for a period of 12 years. These various Reports and the relevant concerns are set out below.
- C2. Dated November 2007, Volume Five of the Auditor-General's 2007 Report states at page 201:

Aboriginal Land Claims

We recommend the Department reduces the time taken to process
Aboriginal Land claims.

The Department investigates aboriginal land claims made under the *NSW Aboriginal Land Rights Act 1983*. Under the Act, claims can be made over claimable Crown land, being lands that can be lawfully sold or leased, or are reserved or dedicated for any purpose under the *Crown Lands Act* or *Western Land Act* and are not required for an essential purpose, not required for residential land, or not lawfully used and/or occupied.

During the year 1,154 (6,980 in 2005-06) Aboriginal Land Claims were lodged and 387 (182) were finalised. Of these, 12 claims were granted and 375 were refused. A large proportion of the claims lodged in 2006-07 were over freehold land. Claims over freehold land cannot be granted under the *NSW Aboriginal Land Rights Act 1983*, and these claims do not require further investigation.

Of the 15,581 claims lodged under the Act to 30 June 2007, 8,922 (57 per cent) were unresolved as at 30 June 2007, with 344 claims unresolved for more than ten years.

- C3. Dated December 2010, Volume Nine of the Auditor-General's 2010 Report states at page 36:

Since 2007, I have been recommending that the [Land and Property Management] Authority significantly reduces the time taken to process Aboriginal Land Claims and transfer legal title to successful claimants.

I have also been recommending that legal title over land granted to successful Aboriginal land claimants be issued as soon as practicable. ...

Of the 26,895 Aboriginal Land claims lodged under the [ALR] Act to 30 June 2010, 17,436 (64.8 per cent) were unresolved at 30 June 2010, with 293 claims unresolved for more than 10 years. ...

Legal title cannot pass until the land has been surveyed and recorded on the State's Digital Cadastral Database. Once this has occurred, formal title can pass to the relevant local Aboriginal Land Council. Claimants cannot fully access or use the land until title has passed. Based on current survey resourcing capacity, it may take more than 20 years for all current granted claims to be cleared. We initially reported this matter in 2005.

- C4. Volume Nine of the Auditor-General's 2011 Report states at page 2 that "This summary shows those matters I identified during my audits that I believe are the most significant issues agencies need to address" (emphasis added). The summary at page 2 refers to "More than 26,000 land claims ... still awaiting determination". Further information is provided at page 17 of the report:

A total of 35,839 land claims have been lodged since the inception of the [ALR] Act. Over 9,000 claims have been processed and received determination. More than 26,000 land claims are still awaiting determination by the New South Wales Government and the courts. The majority of these were lodged between 2005 and 30 June 2011. Of these, 284 claims were lodged before June 2000. ...

Last year in the comment for the Land and Property Management Authority, I recommended the Authority reduce the time taken to process Aboriginal Land Claims and transfer legal title to successful claimants. I also recommended that legal title over land granted to successful Aboriginal land claimants be issued as soon as practicable. ...

There are a substantial number of old unprocessed land claims. NSWALC is working with the New South Wales Government to reach a resolution on outstanding claims. Land may be compulsorily acquired by the government under the *Land Acquisition (Just Terms Compensation) Act 1991*. Currently, there is no legislative requirement for a LALC or NSWALC to be notified of a planned compulsory acquisition. Land subject to a claim can be compulsorily acquired between the lodging of a claim and its final determination by the court.

- C5. Volume Six of the Auditor-General's 2012 Report states at page 130:

Over the last four years, outstanding Aboriginal Land Claims have increased by 18,152 or 236 per cent. During 2011-12, 486 (394 in 2010-11) claims were determined leaving 25,834 (25,549) claims remaining at 30 June 2012. The Department expects to take over 52 years to clear the current backlog of land claims based on current trends and resources.

In my previous report, I recommended an urgent review and evaluation of the approach to the processing of Aboriginal Land Claims with the intent of developing and implementing a plan to quickly reduce the number of unprocessed claims. ...

C6. Volume Ten of the Auditor-General's 2013 Report states at page 95:

At 30 June 2013, there were 2,815 Aboriginal Land Claims (25,923 at 30 June 2012) awaiting determination by the Ministers administering the Crown Lands Act 1989. ...

It currently takes 4.4 years on average to determine and grant a land claim, while the average time taken to determine and refuse a land claim is 2.5 years.

C7. Volume Fourteen of the Auditor-General's 2014 Report recommended at page 8 that the Department of Trade and Investment, Regional Infrastructure and Services should "take more effective actions to reduce the number of unprocessed Aboriginal Land claims as well as number of approved land claims not yet transferred out". The report at page 31 depicts a graphic headed "2013-2014 Audit Observations" which contains the following information: "The number of unprocessed Aboriginal land claims have not significantly reduced in the past four years". Further information is provided at page 34 of the report:

At 30 June 2014 there were: 25,724 (25,775 as at 30 June 2013) unprocessed claims ... The number of unprocessed Aboriginal land claims over NSW Crown land made through State legislation increased in 2010-2011 by 8,674 and remained steady over the last three years. Two years ago, we recommended the processing of Aboriginal land claims to be reviewed and a plan be implemented to reduce the number of unprocessed claims. However, the number of unprocessed claims has only reduced by 51 since last year.

It will take 122 years to clear the backlog of claims at the current speed (65 years with three years average speed of 395 claims per year). This assumes there will be no more land claims lodged. ...

At 30 June 2014, there were 287 Aboriginal land claims that had been approved by the Minister or a court, but the land had not been transferred out of DTIRIS. These claims relate to land worth approximately \$719 million. Thirty-seven per cent of these claims were approved more than 10 years ago.

The main reason for claims not being transferred is that a land survey is needed before obtaining full land title.

C8. Volume Twelve of the Auditor-General's 2015 Report stated at page 7: "The number of unprocessed Aboriginal land claims at 30 June 2015 was 28,054 (25,724 at 30 June 2014). Based on the five year average clearance rate, it will

take approximately 80 years to clear the existing backlog, not accounting for any future claims.” The report further recommended at pages 4, 7, 11, 36 and 45: “The Department should implement measures to reduce the number of unprocessed Aboriginal land claims”. Further information is provided at page 34 of the report:

The Department is developing a framework to apply the recent legislative changes to the Aboriginal Land Rights Act 1983 which allows for Aboriginal Land Agreements. It expects this will improve the rate of processed claims by allowing for the resolution of multiple land claims in one negotiation process.

- C9. Volume Twelve of the Auditor-General’s 2016 Report stated at page 7 under the heading “Unprocessed Aboriginal land claims continue to increase”: “The number of unprocessed Aboriginal land claims at 30 June 2016 was 29,284 (28,054 as at 30 June 2015). Based on the five year average clearance rate, it will take approximately 75 years to clear the existing backlog”. Further information is provided at page 34 of the report:

The Department has implemented [an] initiative to deal with unprocessed Aboriginal land claims. They have resulted in the number of claims determined during the year increasing from 204 in 2014-15 to 567 in 2015-16. However, the number of unprocessed claims continues to increase. ...

The Department reported the claims backlog grew due to factors, such as:

- limited resources to process and manage claims
- the complexity of claim investigation and legal challenges to claims
- land claim legislation which provides limited restrictions on new claims, and often results in multiple claims over the same property

In 2015-16, of the 567 claims determined, 146 were successful and 421 refused or withdrawn. ...

- C10. The Auditor-General’s Report on Industry 2017 stated in its Executive Summary at page 1: “Despite a continued focus, the Department has been unsuccessful in reducing the number of unprocessed Aboriginal land claims. The Department should continue to implement measures to reduce the backlog of unprocessed Aboriginal land claims”. Further information is provided at page 24 of the report:

At 30 June 2017 there were 32,361 unprocessed claims an increase of 3,077 or 10.5 per cent from 30 June 2016. ...

In 2016-17 there were 3,464 claims lodged and 387 claims determined. The number of claims determined fell from 567 in 2015-16. Ninety-eight (146) claims were successful and 289 (421) claims were refused or withdrawn.

...

At 30 June 2017, the Minister or a court had approved 193 (194 at 30 June 2016) Aboriginal land claims, but the land had yet to be transferred out of the Department. This land had been valued at approximately \$350 million, but was written down to zero by the Department to reflect the successful claims. Eighty-four (87 at 30 June 2016) of the claims were approved ten or more years ago.

The Department is implementing strategies to reduce the number of approved claims waiting survey and transfer to acceptable levels by 2018-19.

- C11. The Auditor-General's Report entitled "Industry 2018" recommended the Department should reduce unprocessed claims and stated at page 10:

The Department has not been able to reduce the number of unprocessed Aboriginal land claims over Crown land, as new claims lodged exceeded claims processed. The Department's unaudited data shows the number of claims determined during the year increased to 492 in 2017-18 (387 in 2016-18). At 30 June 2018 there were 33,452 unprocessed claims, an increase of 1,091 or 3.4 per cent from 30 June 2017. ...

In 2017-18 there were 1,484 claims lodged and 492 claims determined. The number of claims determined increased from 387 in 2016-17. One hundred and five claims were successful and 387 claims were refused or withdrawn.

A key initiative to reduce the unprocessed claims is the development of Aboriginal Land Agreements, which allow for the settlement of multiple land claims. The Department has entered into negotiations in seven locations and will continue to meet with the participants to facilitate the assessment and resolution of land claims.

In 2017-18, the Department has been working with the NSW Aboriginal Land Council to prioritise land claims that provide economic, social and cultural benefit to Land Councils. ...

- C12. The Auditor-General's Report entitled "Planning, Industry and Environment 2019" recommended the Department should "prioritise" action to reduce unprocessed claims and stated at pages 14 and 24:

The DOI has not been able to reduce the number of unprocessed Aboriginal land claims over Crown land, as new claims lodged exceed claims processed. The DOI's audited data shows that there were 35,855 unprocessed claims at 30 June 2019, an increase of 2,403 or 7.2 per cent from 30 June 2018. There were 6,906 claims unprocessed more than ten years after they were lodged.

Reports to Parliament since 2007 have recommended action to address the increasing number of unprocessed claims. At that stage, 8,9222 claims were unprocessed. ...

In 2018-19, there were 3,232 claims lodged and 1,037 claims determined. The number of claims determined increased from 492 in 2017-18. One hundred and eighty-two claims were successful and 855 claims were refused or withdrawn. ...

The DPIE is continuing a voluntary land negotiation program with the NSW Aboriginal Land Council, and various Local Aboriginal land councils and local government councils which started in 2016. This program considers Crown land in a given area and explores which party is best placed to manage that land. The DPIE has advised that as a part of this program, a stocktake of the Crown land is undertaken in the subject area. This program will also assist in reducing the number of unprocessed Aboriginal land claims.

In 2018-19 two new locations were added to the Land Negotiation Program. The program is not yet completed at any of the locations.